Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1998

DIANE ALICE SCHWARTZ,

*Petitioner,*

v.

JOSEPH S. GREGORI, M.D., and JOSEPH S. GREGORI, M.D., INC., Individually, & as Trustee and Administrator of Pension Plan & Trust,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

This case involves important federal issues regarding the interpretation and application of the Employee Retirement Insurance Security Act of 1974, 29 U.S.C. Section 1001 et seq. (ERISA), and specifically issues related to the standard of law and the standard of review to be applied when considering whether a statutory award of attorney fees is appropriate under the fee shifting provision of 29 U.S.C. Section 1132(g)(1), ERISA 502(g)(1). The questions specifically formulated are:

1. Whether the ERISA fee decision of the Sixth Circuit is in conflict with the Third Circuit on the standard of law applied when determining the appropriateness of a statutory fee award under § 502(g)(1)?

2. Is the Sixth Circuit decision in conflict with the Third and Ninth Circuits on the standard of review to be applied when determining a statutory fee award?

3. Whether the decisions of the lower courts have decided an important question of federal law which have not been, but should be, settled by the Supreme Court?

4. Is the Sixth Circuit decision a significant departure from the accepted application of the standard of law as to call for an exercise of this Court's power of supervision?

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## PETITION FOR A WRIT OF CERTIORARI

Diane A. Schwartz respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 20, 1998 to (1) resolve the conflict between the Third, Sixth, and Ninth Circuit Courts of Appeals on the important issue presented herein, and (2) to exercise this Court's power of supervision when a Court of Appeals sanctions a lower court's departure from the accepted standard of law.

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed on November 23, 1998 affirming the decision of the District Court, and denying Petitioner Schwartz's application for attorney fees on appeal. It is reprinted in Appendix I hereto ("App. I") at page A-1. By order filed December 23, 1998, the Sixth Circuit denied the petition for rehearing en banc. (*See* App. I, p. A-12).

The Memorandum Opinion and Order of the U.S. District Court for the Northern District of Ohio, filed 9/26/97, denying Petitioner's application for appellate attorney fees (*See* App. I, p. A-13).

The Report and Recommendation of the Magistrate Judge, filed July 23, 1997, granting Petitioner's application for appellate fees, with a reduction in the amount sought. (*See* App. I, p. A-20.).

## JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on November 20, 1998. Subsequently, the appellant timely petitioned for rehearing and suggestion for rehearing en banc, which was denied on December 23,

1998. Pursuant to Supreme Court Rule 13.4, this Petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1).

## STATUTES INVOLVED IN THIS CASE

29 U.S.C. Section 1132(a)(3)(B)(i)(ii)

29 U.S.C. Section 1132(g)(1)

29 U.S.C. Section 1140.

Copies are attached hereto in Appendix III.

## STATEMENT OF THE CASE

### A. Introduction

The instant Petition for a Writ of Certiorari is the second appearance before this Court in this case.

The first appearance before this Court in 1995 involved the original case on the merits (the decisions of the trial court, Sixth Circuit, and Supreme Court are reprinted in Appendix II attached to this Petition).

The instant Petition involves the denial of Petitioner Schwartz's application for an award of appellate fees (the decisions of the Magistrate Judge, District Court Judge and the Sixth Circuit are reprinted in Appendix I attached to this Petition).

The jurisdiction of the District Court was invoked pursuant to 29 U.S.C. Section 1132(g)(1).

### B. Background of Litigation in Original Case on the Merits

In November 1988, Petitioner Schwartz filed a Complaint in federal district court setting forth ERISA violations (breach of fiduciary duty and loss of pension funds)

committed by Respondent Gregori, who was her employer for 18 years, and the administrator and trustee of the Petitioner's employee pension plan.

In December 1988, Respondent Gregori (violated ERISA § 510) wrongfully terminated Petitioner Schwartz's employment in retaliation for Petitioner's having commenced a lawsuit in seeking the protection of the federal court in order to enforce her ERISA rights, *see* App. II at p. A-71.

In July 1993, after a three (3) day bench trial, the district court held that Respondent Gregori was liable for a number of ERISA violations and awarded Petitioner Schwartz her lost pension benefits, restitution for lost wages, and attorney fees for trial representation, App. II at pp. A-71-78.

Respondent Gregori filed an appeal from the district court decision and in 1995, the Sixth Circuit Court of Appeals, in a published decision, essentially determined that the appeal of Respondent Gregori was unsubstantiated by caselaw authority, *see* Appendix II at pp. A-47-55. The 1995 Appeals Court also held that the factual basis for Respondent Gregori's appeal was unfounded, *see* Appendix II at pp. 49, 50. The 1995 Sixth Circuit affirmed that Gregori was liable for retaliatory firing and, therefore, culpable. Furthermore, the 1995 Appeals Court rejected Respondent's challenge to the remedy available under ERISA, and the Appeals Court held that an award of lost wages under ERISA is restitutionary in nature and is appropriate relief under ERISA provision 29 U.S.C. Section 1132(a)(3)(B)(i) and (ii), *see* App. II at pp. 50-54.

In October 1995, this Court denied Gregori's Petition for a Writ of Certiorari.

### C. Instant Petition for Writ of Certiorari

The two unsuccessful appeals of Respondent Gregori (original case on the merits) caused a substantial amount of attorney fees to be generated, thereby creating an attorney fee obligation incurred by Petitioner Schwartz in excess of $62,000.

In 1995, Petitioner Schwartz filed application (in the U.S. District Court) for a statutory fee award for appellate representation, pursuant to ERISA § 502(g)(1).

In July of 1997, a Federal Magistrate Judge, upon hearing, approved Schwartz's appellate attorney fee award, *see* App. I at p. A-20.

In August 1997, Respondent Gregori filed objections to the Magistrate award, and in September 1997, the U.S. District Court Judge overruled (did not adopt) the Magistrate Judge's decision, and thereby denied Schwartz's application for appellate fees, *see* App. I at p. A-13.

In October of 1997, Schwartz appealed the District Court denial of appellate fees on the basis that the District Court did not properly apply the standard of law in determining the appropriateness of fees on appeal.

In November 1998, the Sixth Circuit affirmed the district court's denial of Petitioner Schwartz's appellate fee application, *see* App. I at p. A-1.

In December 1998, Schwartz's Petition for Rehearing & Suggestion for rehearing en banc was denied by the Sixth Circuit, *see* App. I at p. A-12.

It is from the denial of her application for an award of appellate fees that this Petition for a Writ is sought.

Attorney fees may be awarded in actions brought under the Employee Retirement Security Act of 1974. The statute, however, provides no standard for a fee award, stating only that "the court in its discretion may allow a reasonable attorney's fee and costs of action, 29 U.S.C.

Section 1132(g)(1). To guide district courts as they exercise their discretion in connection with such fee applications, various federal circuit appeal courts have adopted a five-factor standard that must be considered:

> (1) the degree of the opposing party's culpability or bad faith, (2) the opposing party's ability to satisfy an award of attorney fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions, *Secretary of Dep't of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980).

In its application of the above five-part standard, the Sixth Circuit held that Petitioner Schwartz is not entitled to attorney fees on appeal. In denying Petitioner Schwartz her application for fees, Petitioner submits that the Sixth Circuit opinion misinterprets the five-part test for fees, and further, the opinion of the Court below is in direct conflict with the Third Circuit Court of Appeal's decision in the ERISA case of *McPherson v. Employees Pension Plan*, 33 F.3d 253 (3d Cir. 1994). In determining fees under the five-part guideline, it is essential that each of the five factors be weighed in a manner that properly applies the criteria to the facts of the case. In the instant case, the Sixth Circuit failed to properly apply the criteria under factor one to the facts of this case and to the record on appeal, and instead, the Appeals Court held that the culpability of the offending party need *not* be considered.

However, based upon Gregori's challenge, on appeal, to his liability for an ERISA § 510 discharge, *see* App. II at

pp. 48-50, the issue of culpability was raised on appeal. Therefore, based on the record on appeal, the criteria under factor one compels the assessment of the measure of the degree of the offending parties' culpability. The Court below left out an indispensable part of the equation under factor one analysis – degree of culpability – in determining the appropriateness of an award of fees on appeal. The 1998 Sixth Circuit Fees' decision also overlooks the record on appeal, and disregards the 1995 Sixth Circuit decision affirming the liability, or culpability of Gregori, on appeal.

Furthermore, the Sixth Circuit decision conflicts with the Third Circuit on the interpretation and the proper application of the Five Part Standard of Law. In the Third Circuit *McPherson* case, the Court held that both questions under Factor one analysis must be asked in determining the appropriateness of awarding fees – bad faith *or* degree of culpability. Whereas, the Sixth Circuit analysis under Factor One asked only the one question – whether the appeal was brought in bad faith.

This Court, therefore, must resolve an important question of federal law that impacts upon pensioners across the United States, and make a determination as to the proper standard of law to be applied by the federal courts on the question of statutory fees under ERISA.

## REASONS FOR GRANTING THE WRIT

### I. THE SIXTH CIRCUIT OPINION DIRECTLY CONFLICTS WITH THE THIRD CIRCUIT'S RULING IN *McPHERSON* AND DEFEATS THE REMEDIAL PURPOSE OF THE FEE SHIFTING PROVISION OF ERISA SECTION 29 U.S.C. 1132(g)(1).

This case involves a very important federal issue to all litigants seeking protection under the Employee Retirement Insurance Security Act of 1974, specifically, 29

U.S.C. Section 1132(g)(1), (hereinafter ERISA Section 502(g)(1)). What is the standard of law to be applied when considering whether a statutory award is appropriate under the fee-shifting provision of ERISA 502(g)(1)?

The standard of law applied by the Court below on the ERISA fee's determination is in direct conflict with the Third Circuit's decision in *McPherson v. Employees Pension Plan*, 33 F.3d 253 (3d Cir. 1994), resulting in two different standards applied by Circuit Courts, therefore, certiorari is appropriate here. This court must resolve conflicting interpretations of the standard of law in evaluating a request for attorney fees under ERISA 502(g)(1).

The five-part test is applied by the Sixth Circuit without consideration of the core issue under factor one as developed in the federal common law case law – the degree of culpability of the offending party. The Court below erroneously omits an integral part of the analysis under Factor One, and therefore misapplies the test for assessing fees under ERISA. The Opinion of the Court below also falls short of the mark when it fails to consider the connection between the offending conduct of the opposing party (Gregori) who violates federal law under ERISA, and the objective of Factor Three to deter such illegal conduct through the imposition of the fee-shifting provision of ERISA. Consequently, the analysis of the Court below results in a denial of fees, which in turn, will have a chilling effect upon ERISA litigants. The ERISA statute, § 502(g)(1), permitting an award of statutory attorney fees, provides access to federal courts through the ability of an employee and pension plan participant to obtain counsel, and to seek complete relief for ERISA violations. If fees are not shifted, prevailing plaintiffs, as is the situation in this case (Petitioner Schwartz prevailed on every issue on appeal), will have to pay their own

fees, thereby effectively substantially reducing or virtually eliminating the value of their recovery. Additionally, employees seeking to recover benefits will have difficulty bringing cases because of a lack of attorneys willing to take ERISA cases. This result defeats the intention of Congress which is to provide . . . participants and beneficiaries with broad remedies for preventing violations . . . " S. Rep. No. 127, 93d Cong. 1st Sess. 35 (1973), U.S. Code Cong. & Admin. News 1974, pp. 4639, 4871, quoting from *Armistead v. Vernitron*, 944 F.2d 1287, at p. 1302 (6th Cir. 1991).

The instant case is an egregious example of offensive conduct evincing a complete disregard for the rights of an employee/pensioner under the federal statute, ERISA, *see* App. II, at pp. A 67-71 (trial court order), affirmed on appeal, *see* App. II at p. A 42 (Court of Appeal decision 1995). Respondent Gregori violated Schwartz's pension rights by illegally investing her pension money and losing benefits, and then Gregori compounded the damage caused to Schwartz by firing her because she filed suit in federal district court in retaliation for her exercise of her ERISA pension rights. It is submitted that the federal test for fees is based upon the conduct of the offending party, and the need to deter it. The test (to assess fees under ERISA) is not about protecting the appeal rights of the wrongdoer, as seems to be the view of the Court below when it states: a "party contemplating appeal of an unanswered legal question regarding ERISA with general applicability, such as here, ought not to be deterred for fear of an attorney's fees award," *see* App. I at p. A-10.

It appears that the Court below has lost sight of the forest amid all the trees. The forest in this case is the basis for the five-part federal test for awarding fees under ERISA'S fee-shifting statute, 502(g)(1), and the objectives sought in its application. Petitioner believes and asserts

that Factor Three – deterrence – is focused upon furthering the objectives of ERISA by preventing the kind of illegal conduct that occurred in the instant case through the imposing of fees and costs upon the offending party. The award of fees and costs is intended to cause other plan administrators to fulfill their legal and fiduciary duties and act more equitably in evaluating future responsibilities. As stated by the Magistrate Judge in this case (District Court for the Northern District of Ohio), when discussing the deterrent value of Factor Three:

> "The deterrent effect of an award is a compelling factor here. As the record reflects, the plan was established by, in essence, a small business owner who failed to fulfill his fiduciary duties to the plan. To require the payment of fees in such a circumstance sends a strong message to those similarly situated that the duties of a fiduciary should be carried out without fail. This deterrent component is particularly relevant in light of the fact that Plaintiff (Schwartz) was only one of a few members of those participating in the plan," *see* App. I at pp. A 30-31.

However, under its reading of the federal test for fees pursuant to Factor Three – deterrence – the view of the Sixth Circuit seeks to protect the offending party's right to freely litigate an appeal. The Court below determined that Factor Three weighed in favor of Gregori, stating Gregori "ought not to be deterred for fear of attorney's fees" from litigating an appeal, *see* App. I at p. A-10. What about the ERISA rights of Petitioner Schwartz, a litigant who prevailed on all issues in this case, to receive complete relief, and to be awarded statutory fees when the opposing party unsuccessfully appeals. The view of the Court below does not address the furtherance of the

objective of deterrence as a goal to prevent conduct violative of ERISA, and the opinion of the Court below muddies the waters on how the federal test is to be applied.

It is submitted that the Fees Opinion of the Court below misses the whole point of the deterrence objective under Factor Three analysis. It is precisely the kind of offensive conduct that Gregori engaged in, *e.g.*, illegal conduct violative of ERISA, which forms the basis of the analysis that is the focus of Factor Three deterrence. The 1998 Sixth Circuit fees' decision did not properly evaluate whether the appeal arguments raised by Gregori regarding his liability, or culpability, were credible and supported by the evidence of record and caselaw authority. The Court below, therefore, misapplied the standard of law in evaluating a fee application, on appeal, resulting in the mistaken conclusion of law that fees are not appropriate when "novel" issues are appealed by the offending party.

The Sixth Circuit's interpretation of the federal standard for awarding fees under Factor Three analysis – deterrence – is also in conflict with the holding of the Third Circuit in *McPherson*. The approach of the *McPherson* Court is similar to the Magistrate Judge opinion in the instant case, wherein the *McPherson* Court holds:

> " . . . A similar difficulty exists with the district court's analysis of the . . . third factor – "the deterrent effect of an award of attorneys' fees against the offending party." The district court concluded that "there appears to be no need to deter such conduct by the defendants" because "[t]here is no indication that the committee acted in bad faith." We find this reasoning flawed."
>
> "We believe it will further the objectives of ERISA if fee awards are employed to deter

> behavior that falls short of bad faith conduct . . . (citation omitted) (a case in which "culpability . . . has been shown," fee award will make plan "less likely and not so quick to deny benefits to other participants" and thus be "a deterrent factor"). Even if the Committee did not act in bad faith, the district court should have considered whether it would serve the objectives of ERISA to award counsel fees in an effort to deter conduct of the kind in which the Committee engaged," *see McPherson v. Employees' Pension Plan*, 33 F.3d 253, at p. 258 (3d Cir. 1994).

As with *McPherson*, the fee award opinions of the Courts below employ flawed reasoning. Neither of the lower courts considered the issue of Factor One – the degree of Gregori's culpability, as it related to the issues raised on appeal. Both of the lower courts reviewed the question of whether Gregori appealed in "bad faith" and did not address Gregori's challenge, on appeal, relating to his culpability. Hence, the analysis of the lower courts reflect the view that the illegal conduct of the wrongdoer, Gregori, is unimportant in the equation of assessing the appropriateness of fees on appeal. This view of the Court below, under Factor One, as pointed out by the Third Circuit in *McPherson*, infects the remainder of the analysis under the five-part test, and is inconsistent with the analysis contemplated under Factors One and Three of the test for fees, *see McPherson*, 33 F.3d 253 at p. 256. The whole purpose of the analysis under Factor Three is to assess whether the conduct of the offending party, Respondent Gregori, reaches a degree of culpability that would warrant a fee award which, in turn, would act as a deterrence to others. The focus, therefore, of Factor Three deterrence, is upon the degree of the wrongdoer's behavior. In other words, the Sixth Circuit ERISA fees opinion

in this case asks the wrong question. The question under Factor Three analysis is not whether an award of fees would instill "fear" in the offending parties' outlook or motivation toward litigating an appeal, and hence, deter the pursuit of the so-called "unanswered legal question," concerning the remedy under ERISA. The relevant or pertinent question here is whether the offending party behaved so badly that a fee award should be granted for the purpose of deterring such conduct in others. It is submitted that the culpability question under Factor One must be asked in order to serve the objectives of ERISA § 502(g)(1).

Therefore, a conflict exists as to the federal standard to be applied by the lower courts in determining the appropriateness of a fee award under ERISA, and this question, being of great importance to ERISA litigants, must be settled by this Court.

## II. THE STANDARD OF LAW APPLIED BY THE THIRD CIRCUIT IN *McPHERSON* IS THE BETTER REASONED APPROACH IN EVALUATING THE APPROPRIATENESS OF WHETHER TO AWARD FEES PURSUANT TO ERISA 502(g)(1)

### A. THE SIXTH CIRCUIT MISCONSTRUES FACTOR ONE

In its application of the five-part standard, the Sixth Circuit held that it was *not* necessary to examine the conduct of the offending party when considering the criteria under Factor One in the assessment of whether fees should be awarded for appellate representation. The Court stated:

> "With regard to the first factor, we must address the parties' disagreement over the manner in which it applies to appellate attorney's fees. Ms. Schwartz argues that, in determining

> the degree of the opposing party's culpability or bad faith, courts must examine the bad faith or culpability of the Gregori defendants in the *underlying lawsuit*, whereas, the appellees maintain that, because Schwartz seeks appellate fees and costs, courts should review whether the Gregori defendants pursued their appeal in bad faith. Logic dictates the answer to this question; where an appellee seeks attorney's fees and costs for services performed in connections with defending an appeal, we review whether the appellant pursued this appeal in bad faith and not whether the appellant's conduct which resulted in litigation warrants a finding of bad faith or culpability," *see* App. I at p. A-7. (emphasis added).

Contrary to the holding of the Court below, Ms. Schwartz *did not* assert that the Appeals Court "must review the appellant's conduct in the *'underlying lawsuit'* relating to bad faith or culpability." Throughout her instant appeal on the issue of fees, on appeal, Schwartz argued that Respondent Gregori's *appeal arguments* were unsupported by the factual record, and had no credible basis pursuant to caselaw authority. However, the Fees Opinion of the Sixth Circuit in 1998 omitted from its review a substantial part of the appeal issues that were raised by Gregori in 1995, as can be gleaned from a reading of the two decisions of the Sixth Circuit reprinted in the Appendix hereto, *see* App. I at p. A-1, and *see* App. II at p. A-42. The 1998 Sixth Circuit opinion reviews only one of seven of the appeal issues raised by Gregori in 1995, and the Court below leaves its review there; that is, the Appeals Court in the instant case (on the issue of fees) revisits the 1995 Appeal on the merits, and determines that the applicability of the U.S. Supreme Court decision in *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 124 L.Ed.2d 169 (1993) was a legitimate issue on appeal, and therefore, the Court below concluded that Gregori's appeal

argument based thereon is sufficient enough basis upon which to find that Gregori's appeal was not in bad faith. However, what about the rest of the 1995 appellate record? The 1995 Sixth Circuit decision, on the merits, rejected all of Gregori's arguments on appeal, *see* App. II at pp. A-47-55. Now, in 1998, the Court below, in its ERISA fee decision, omits from its opinion important parts of the 1995 record on appeal.

In 1995, the Sixth Circuit decision determined that Gregori's appeal arguments relating to his liability under ERISA § 510 were not credible and disregarded the plain meaning of the ERISA statute, *Schwartz v. Gregori*, 45 F.3d 1017, 1021, 1022-1023, *see* App. II, at pp. A-42, 49. For example, Gregori argued, in the 1995 appeal, erroneously, that ERISA § 510 did not protect employees from retaliating acts which are not intended to affect their benefit entitlement. Gregori misplaced his reliance on cases that were inapposite to the issue in this case. Therefore, the 1995 Appeals Court affirmed that Gregori was liable for an ERISA § 510 violation, and that Gregori's arguments to the contrary were not supported by caselaw authority, *Schwartz v. Gregori*, 45 F.3d 1017, 1021, 1022-1023, *see* App. II, at p. A-42. In contravention, the 1998 Appeals Court now holds that appellate fees should be denied, and does not even consider that Gregori's 1995 appeal theories of legal liability under the ERISA statute were unsubstantiated by caselaw authority and rejected by the 1995 Appeals Court. Why? It is submitted that the fee opinion in the instant case is a bad decision, making bad law. It should be reversed for the reasons set forth in this Petition.

The 1998 Sixth Circuit Fees Opinion also omits other matters from its consideration that are an important part of the 1995 appellate record concerning factual issues

under Factor One culpability. Gregori's 1995 appeal arguments were not supported by the evidence of record, *see Schwartz v. Gregori*, 45 F.3d 1017, 1021, *see* App. II, at pp. A-49, 50. In 1995, the Appeals Court affirmed the trial court, upon independent appellate review, that all of Gregori's stated reasons for firing Schwartz were pretextual and the real reason for discharging Schwartz was her filing a lawsuit to enforce her rights, *see Schwartz v. Gregori*, 45 F.3d 1017, 1021. The 1995 Appeals Court, therefore, stated that there existed no legitimate basis for disturbing the district court's factual findings, and as to pretext, held: "The district court was entitled to disbelieve Gregori's stated reasons for the discharge, particularly in light of the fact that: (1) Gregori threatened to fire Schwartz if she filed suit; (2) the reasons given to Schwartz at the time of her discharge were proven to be untrue; and (3) the reasons advanced at trial differed from those given to Schwartz at the time of her discharge, *Schwartz v. Gregori*, 45 F.3d 1017, 1021 (6th Cir. 1995), *see* App. II at pp. A-49, 50.

Therefore, the 1995 Appeals Court essentially determined that Gregori's appeal arguments had no basis in law or fact, and were without merit. Nonetheless, the 1998 Appeals Court fee decision fails to fairly, thoroughly and genuinely address the 1995 appeals record in determining the fee issue; and, overlooks significant issues on appeal, disregards the offensive conduct of the offending party who violates ERISA, and relegates the many appeal issues raised by Respondent Gregori to a mere footnote, *see* App. I at p. A-8, fn.6.

In *McPherson*, the Appeals Court remanded the fee issue to the District Court holding that the District Court is required to assess the degree of culpability of the wrongdoer in determining fees.

In the instant case, the Appeals Court failed to properly review the record on appeal for culpability, resulting in the misanalysis of the standard for a fee determination, and a disregard for the rights of an employee/pensioner under ERISA. ERISA was enacted to protect the pension plan of the employee (Schwartz). The reasoning of the Sixth Circuit should be rejected in that it condones the offensive conduct of the wrongdoer in this case. The conduct of the wrongdoer is the proper focus of inquiry under the federal test for fees. It was Respondent Gregori who fired Schwartz in retaliation causing her harm. It is Schwartz who was the victim in this case. Respondent Gregori did not act out of ignorance, nor did he act merely by committing a mistake when he violated ERISA. In this case, Respondent Gregori was determined at trial, and on appeal, to have acted knowingly in the commission of multiple ERISA violations. However, the Court below did not review for degree of culpability under Factor One, and instead, finds that Gregori raised a "novel" issue on appeal as to the impact of the *Mertens* case upon ERISA remedies, and based the denial of fees thereon. The Court below held:

> "We agree with the defendants that their pursuit of this issue was not in bad faith. As acknowledged by our Court in the Gregori I opinion, 45 F.3d at 1021, the intervening Supreme Court decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), necessitated revisiting the question of whether back and front pay constituted legal or equitable remedies. While our Circuit had previously sanctioned awards of back pay in ERISA § 510 actions, *Mertens*, held that compensatory damages were not permitted in ERISA § 502(a)(3) actions thereby requiring our Circuit to determine whether back and front pay are a form of compensatory damages . . . Thus, the Gregori

defendants pursued an issue which had to be newly addressed by our Circuit . . . ", *see* App. I at pp. A-8, 9.

Notwithstanding that the Sixth Circuit Appeals Court in 1995 revisited the issue of ERISA remedies in light of *Mertens*, the holding of the 1995 Sixth Circuit was favorable to Schwartz. The 1995 Sixth Circuit determined that the Supreme Court in *Mertens* "recognized restitution is a remedy typically available in equity, and falls within § 502(a)(3)'s category of appropriate equitable relief," *see* App. II at pp. A-53, 54. Thus, the 1995 Sixth Circuit opinion declared that the lost wages awarded to Schwartz constituted restitution, and is an equitable remedy available under § 502(a)(3), and that such an award is not precluded by the intervening Supreme Court decision in *Mertens*. It makes no sense, therefore, that Petitioner Schwartz, having prevailed on this issue on appeal in 1995 (and having prevailed on every other issue on appeal), that the Court below now holds that this mitigates against awarding Schwartz fees simply because the ERISA remedy theory asserted by Respondent Gregori was a "novel" and "unanswered issue". The standard to determine fees examines more than just remedy theory, it evaluates the evidence of the conduct of the offending party. If the fee decision of the Court below stands, it will send a message that pension administrators may flaunt the law more egregiously knowing that they may bring an appeal and lose the appeal, and yet lose nothing because the Courts will not invoke the fee-shifting provision of ERISA. It is submitted that the 1998 Sixth Circuit ERISA fee decision presents a myopic view, and the rationale of the Court defeats the legislative purpose of ERISA.

Furthermore, the relief sought in *Mertens* was clearly distinguishable from the remedy of restitution sought by Petitioner Schwartz in this case. As stated by Justice

Scalia, *Mertens* is not a case where Petitioners "seek a remedy traditionally viewed as 'equitable,' such as injunction and restitution, *Mertens*, 124 L.Ed.2d at p. 169. Also, as stated by the 1995 Sixth Circuit, the U.S. Supreme Court in *Mertens* expressly recognized that back pay can be restitutionary, and as such is an equitable remedy, *see* App. II at pp. A-52, 53, fn.4.

*Mertens* is not a case on point. The plaintiff in *Mertens* filed a breach of fiduciary action against a nonfiduciary actuary who allegedly participated in the plan fiduciaries' breach. *Mertens* does not even tangentially address the issue in the case at bar as to what damages are available to a plaintiff who is discharged in violation of ERISA § 510 for attempting to enforce her rights as a participant in an ERISA pension plan. Instead, the issue in *Mertens*, according to Justice Scalia, was "whether a nonfiduciary who knowingly participates in the breach of fiduciary duties imposed by ERISA is liable for losses that an employee benefit plan suffers as a result of the breach," *Mertens*, 124 L.Ed.2d at p. 166.

It is submitted that the focus of the federal test on the fee question is not upon the interpretation of what remedies are available under ERISA. As set forth hereinafter, the *McPherson* Court presents the better approach, wherein the test of whether to award fees focuses on the conduct of the wrongdoer, and it is the degree of culpability of the offending party that is the subject of inquiry. The test for fees is the same, on appeal, and the focus does not shift or change simply because an appeal has been litigated. The District Court holding of 1993 was upheld in all respects by the Sixth Circuit in 1995. The 1998 fee decision of the Court below is unsupported by the appeal record, the reasoning is fundamentally flawed,

and it presents a conflict between Circuits on the Standard of Law when determining a statutory fee application under ERISA § 502(g)(1).

### B. *MCPHERSON* PRESENTS THE BETTER REASONED APPROACH IN THAT BOTH CULPABILITY AND BAD FAITH SHOULD BE REVIEWED UNDER FACTOR ONE ANALYSIS

The *McPherson* Court of Appeals held that analysis under Factor One requires that both questions be asked in evaluating the appropriateness of fees: (1) the degree of the opposing party's culpability *or* bad faith. The 1998 Sixth Circuit Fees Opinion undermines the basis for fee-shifting under ERISA when it holds that a review into the culpability of the offending is not necessary. It is exactly the kind of wrongful conduct that Respondent Gregori committed, *see* App. II at pp. A-67-71, retaliatory discharge of Petitioner Schwartz, that ERISA Section 510 was promulgated to prevent or deter. If the logic of the Sixth Circuit is followed, and a review by the Appeals Court does not factor the wrongdoer's conduct into the evaluation of whether fees are appropriate, and if culpability is overlooked, then the remedy for an ERISA violation will be effectively nullified.

*McPherson* presents the better reasoned approach. The Third Circuit Court of Appeals in *McPherson* determined that in the evaluation of whether to award fees, the Court must ask both questions under Factor One: the degree of the opposing party's culpability or bad faith. The *McPherson* Appeal Court remanded the case to the District Court to determine the appropriateness of awarding attorney fees, and the Court held:

> "We hold only that the district court used an incorrect legal standard to evaluate McPherson's request for attorneys' fees. When analyzing the first . . . factor, it considered only

> whether the defendants acted in bad faith, not whether they acted culpably, and if so, what was the degree of their culpability," *McPherson*, 33 F.3d 253, 258.

The *McPherson* Appeals Court, therefore, applied a different standard than does the Sixth Circuit, wherein the *McPherson* Court, considers an inquiry into the opposing party's culpability as an indispensable element to be factored into the assessment of the appropriateness of a fee award.

In disapproving of the (District Court's) singular inquiry into the question of the opposing party's bad faith (under Factor One), the Third Circuit stated:

> "As we read the district court's comments, they appear to reflect a view that the first, third, and fifth factors cannot favor an award in the absence of a finding that the defendants have acted with a "sinister motive," i.e., that they have acted in "bad faith." We conclude that this view is inconsistent with the analysis contemplated by *Ursic* and that a proper *Ursic* analysis in this case might result in an award to McPherson."
>
> . . .
>
> "The first . . . factor favors an award to the prevailing party not in cases involving "bad faith" but in other cases as well. As the district court recognized, bad faith normally connotes an ulterior motive or sinister purpose (citation omitted). A losing party may be culpable; however, without having acted with an ulterior motive. In a civil context, culpable conduct is commonly understood to mean conduct that is "blameable; censurable; . . . at fault, involving the breach of a legal duty . . . citing Blacks Dictionary (6th Ed. 1990). Thus, in *Vintilla v. U.S. Steel Corp. Plan*, 642 F.Supp. 295, 296-97

(W.D. Pa. 1986 aff'd 815 F.2d 697 (3d Cir. 1987), cert. denied, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 100 (1987), for example, the court concluded with respect to the first factor: 'While we cannot ascribe bad faith to Plaintiff's efforts, we do find certain elements of culpability attributable to Plaintiffs.' Indeed, this Court in *Groves v. Modified Retirement Plan, Inc.* 803 F2d 109 (3d Cir. 1986) found an award of counsel fees to be appropriate in an ERISA case without finding that the defendants acted with an ulterior or sinister purpose."

"A party is not culpable merely because it has taken a position that did not prevail in litigation. Nevertheless, if the district court in this case had asked both whether the offending party had acted in bad faith and whether the offending party had acted with culpability, we believe it might have concluded that the first prong of . . . (the five-part test) favored an award to McPherson."

*McPherson*, 33 F.3d 253, 256-257.

The *McPherson* approach embraces the concept that while the offending party may not have acted with a sinister motive, nonetheless, an award of fees may be appropriate in "cases in which the relative merits of the positions of the parties will support an award even in the absence of bad faith litigating," *see McPherson*, 33 F.3d 253, 258. Under the *McPherson* standard, the question of the degree of culpability is an indispensable part of the evaluation of fees (when analyzing Factor One). This standard is in direct conflict with the Sixth Circuit standard wherein the Sixth Circuit specifically held that it does not review for culpability, but only reviews whether the appeal was litigated in bad faith. The Third Circuit, when determining fees, scrutinizes the evidence of record as to the degree of culpability. Conduct of the offending

party, under the standard of the Third Circuit, is the issue when determining fees. The conduct of the offending party is not the issue under the standard announced by the Sixth Circuit. It is submitted that clearly the Third Circuit Standard is the better one as it represents the goal of the ERISA fee-shifting clause to make the victim whole, and deter conduct violative of the statute.

While the *McPherson* Appeals Court reviewed a fee application at the trial level, the same standard of law or the same five-factor test applied by *McPherson* is applicable, on appeal, *see, e.g., Building Service Local 47 Cleaning Contractors Pension Plan, et al. vs. N.E. Ohio Harness,* 47 F.3d 1392, 1404 (6th Cir. 1995), *citing* with approval *Operator's Eng'rs Pension Trusts v. B.E. Backhoe, Inc.,* 911 F.2d 1347 (9th Cir. 1990). In the context of the record in the instant case, where Respondent Gregori litigated an appeal raising substantially the same issues litigated in the trial court proceedings, an inquiry into the basis of the appeal arguments of Respondent Gregori as they relate to his culpability should have been made by the Court below.

It is also submitted that while the *McPherson* Court did not specifically address an ERISA § 510 issue, the holding of *McPherson* is applicable to this case on the standard of law to be employed to assess fees. Irrespective of the particular ERISA provision that the offending party has violated, whether the illegal act consists of a breach of fiduciary duty or retaliatory discharge, the same criteria under the five-part test for fees is applicable. In any case where an ERISA violation occurs, the assessment of the conduct of the offending party is always probative evidence, and relevant to the objective of the ERISA fee-shifting provision, § 502(g)(1), in an effort to prevent or deter violations of the statute.

## III. THE SIXTH CIRCUIT OPINION DIRECTLY CONFLICTS WITH THE THIRD & NINTH CIRCUITS ON THE QUESTION OF THE STANDARD OF REVIEW TO BE APPLIED WHEN REVIEWING A DISTRICT COURT DECISION ON FEES.

Another source of conflict exists between the Sixth, Ninth and Third Circuit Courts of Appeals on the standard of review to be used by the Appeal Court when reviewing the District Courts' exercise of its discretion in a determination of a fee application under the fee-shifting statute of ERISA 502(g)(1).

In the instant case, the Sixth Circuit Court of Appeals determined that "the decision of a district court to award attorney's fees under 29 U.S.C. § 1132(g)(1) will stand absent an abuse of discretion," *see* App. I at p. A-6. Schwartz argued to the Sixth Circuit that a plenary standard should be applied to review the district court denial of fees when, as in the instant case, the district court applied an incorrect legal standard in determining the fee application.

The Third Circuit Court of Appeals held, in *McPherson*, that a plenary standard of review is appropriate so as to provide a full, complete, and unqualified review, and the *McPherson* Court held that the "Court of Appeals' review of legal standards [that the] district court applies, in [the] exercise of its discretion whether to grant attorney fees under ERISA, is plenary," *see McPherson*, 33 F.3d 253 (3rd Cir. 1994), *see also Ellison v. Shenango, Inc., Pension Bd.*, 956 F.2d 1268, at p. 1273 (3rd Cir. 1992) ("In short, the district court must apply the 'correct criteria' to the facts of the case").

The Ninth Circuit Court of Appeals has also applied a plenary standard when reviewing an award or denial of attorney fees under ERISA in *Smith v. CMTA-IAM Pension Trust, et al.*, 746 F.2d 587 (1984). The *Smith* Court stated

that "a decision denying fees will be set aside if the district court (1) abused its discretion (citation omitted); (2) failed to state the reasons for its decision . . . or (3) used incorrect legal standards to reach its decision. *Smith*, 746 F.2d 587 at p. 589 (1984).

Therefore, there exists differing standards of review applied by the various circuits when evaluating the basis and reasoning of the district court decision on the fee question. It is, therefore, important that this conflict among the circuits on the standard of review be settled by the Supreme Court pursuant to its jurisdiction under Rule 10 of the Rules of the Supreme Court. Rule 10 provides, in relevant part, that the exercise of this Court's power of supervision is invoked when a United States Court of Appeals has rendered a decision in conflict with other Circuits on the same matter, or when a Court of Appeals sanctions a lower court decision that has departed from the accepted and usual course of judicial proceedings. In the instant case, the above stated Rule 10 considerations forming the basis upon which to grant a Writ of Certiorari are present. One, there exists a conflict on the standard of review to be applied when an Appeals Court reviews the District Court basis for an award or denial of fees, and secondly, the Court of Appeals in the instant case sanctioned a District Court denial of fees when the District Court applied the incorrect standard of law, and therefore, the lower court departed from the federal standard to be employed in determining fees under ERISA. Therefore, a conflict exists between the circuits on the standard of law and the standard of review in ERISA fee cases.

## IV. THE DENIAL OF FEES ON APPEAL DEFEATS THE REMEDIAL PURPOSE OF ERISA

Petitioner Schwartz incurred substantial appellate lawyer fees in excess of $62,000. The amount of the

appeal fees in this case are directly related to the many meritless positions taken by Gregori on appeal. If the Sixth Circuit decision stands, and if the Petitioner is required to pay her own appellate lawyers fees, the value of the award of the trial court for lost wages ($102,000) will be taken from her in large measure (after taxes Schwartz received approximately $70,000 for lost wages). The equitable relief that was intended by the trial court's award will be nullified if the fee-shifting provision of ERISA 502(g)(1) is not applied in this case on appeal.

In the circumstances of this case, Schwartz was required to defend against the two unsuccessful appeals brought by Gregori. Schwartz prevailed on appeal on every issue challenged by Gregori. If the denial of fees by the lower court stands, then the wrong signal will be sent to all litigants contemplating the enforcement of their ERISA rights as follows: that if the ERISA claim prevails at trial and on appeal, any relief awarded is subject to nullification by the failure of the judiciary to serve the legislative purpose of the ERISA protections through application of the fee-shifting provision. The Eighth Circuit Court of Appeals in a relatively recent case reversing a District Court denial of fees as an abuse of discretion, stated:

> "ERISA . . . is remedial legislation which should be liberally construed to effectuate Congressional intent to protect employee participants in employee benefit plans," *McGee v. Funderburg*, 17 F.3d 1122, 1124 (8th Cir. 1994). "[A] district court considering a motion for attorney's fees under ERISA should [therefore] apply its discretion consistent with the purposes of ERISA, those purposes being to protect employee rights and to secure effective access to federal courts," *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587,

589 (9th Cir. 1984), *Welsh v. Burlington Northern Emp. Ben. Plan*, 54 F.3d 1331, 1342 (8th Cir. 1995).

In the circumstances in this case, fair and complete equitable relief requires that fee-shifting be employed under ERISA 502(g)(1), and that appellate attorney fees be awarded to serve the purpose for which fee-shifting was legislated under the ERISA scheme.

## V. OTHER REASONS FOR GRANTING THE WRIT

### A. SIXTH CIRCUIT ANALYSIS ON FACTORS TWO AND FOUR SHOULD BE REJECTED

#### 1. FACTOR TWO – THE OPPOSING PARTIES' ABILITY TO SATISFY AN AWARD OF FEES

This factor merits little discussion. The opinion of the Court below provides no reasons or basis for its decision. In its decision, the Court below cites some of the evidence adduced at the fees hearing held in 1997 regarding the financial condition of Respondent Gregori, and held:

> "Reviewing this evidence, the District Court concluded that the testimony did not support the Magistrate Judge's conclusion that there may be avenues by which Schwartz could collect from Gregori. We agree and therefore find that this factor also weighs in favor of precluding an award of attorney fees," *see* App. I at p. A-9.

Given that the Court below does not provide any basis or reasons it used to arrive at its decision affirming the District Court, no discussion of Factor Two is possible as to whether there exists a valid basis for the decision of the Sixth Circuit. Petitioner, however, submits, that there existed substantial evidence to support a fee award under Factor Two analysis, *see, e.g.* App. I at p. A-9, and App. I at p. A-31.

## 2. FACTOR FOUR

The decision below is clearly in error when it concludes that "the fourth factor does not weigh in favor of awarding attorney's fees because Schwartz did not seek to confer a common benefit on all participants and beneficiaries of an ERISA plan or seek to resolve significant legal questions regarding ERISA," *see* App. I at p. A-10.

The Sixth Circuit's analysis is patently erroneous in the context of the facts of this case. Schwartz did not seek to confer a benefit on all participants because, in this case, the pension plan consisted only of three (3) people: (1) the Respondent, Gregori, (2) Petitioner Schwartz, and (3) another employee who was not impacted by Gregori's illegal conduct, or had no basis upon which to file an ERISA claim. The Fourth Factor, therefore, did not have any relevant application in this case, and should not have been weighed by the Sixth Circuit against Petitioner Schwartz.

The Magistrate Judge agreed with Petitioner and held that Factor Four is not relevant in this case and he states that "the common benefit to others in the plan is not a relevant factor because there were so few participants in the plan," *see* App. I at p. A-31, fn.8.

Moreover, the Sixth Circuit failed to heed the admonition of the previous Sixth Circuit decision in the case of *Firestone Tire & Rubber v. Neusser*, 810 F.2d 550 (6th Cir. 1987) wherein the Court stated:

> "We note that the five-factor test set forth in *King* is a flexible one developed so as to give guidance to courts in interpreting the discretion to be exercised under the Statute . . . Not all factors will be relevant in a given case, and no single factor is necessarily dispositive . . . *Firestone*, 810 F.2d 550, 558 (6th Cir. 1987).

Therefore, the determination of the Appeals Court upholding the denial of fees by the District Court, is based upon misanalysis and should be rejected as a clear error of judgment in its conclusion upon weighing Factor Four against Schwartz.

### B. SIXTH CIRCUIT CITES CASELAW AUTHORITY IN SUPPORT THAT IS DISTINGUISHABLE

The Court below cites a Ninth Circuit case in support of its proposition that an Appeals Court need not review "whether the appellant's conduct which resulted in litigation warrants a finding of bad faith or culpability." The Court below cites the Ninth Circuit case of *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 414 (9th Cir. 1994), *see* App. I at p. A-7, for the proposition that when the appeal is not brought in bad faith, a fee award is inappropriate. The Court below misplaces its reliance upon the *Devoll* decision of the Ninth Circuit. Upon careful reading, *Devoll* presents a different set of circumstances than the instant case, and is distinguishable. Hence, the Sixth Circuit decision is unsubstantiated by caselaw authority, as pointed out hereinafter.

In *Devoll*, Mr. & Mrs. DeVoll sought review on appeal arguing that they established a prima facie case at trial relating to an ERISA claim, and that the trial court erred in granting summary judgment. The appeals court held that the DeVolls failed to produce any evidence that the employer specifically intended to engage in conduct violating ERISA § 510. In *DeVoll*, the trial court determined that the opposing party did not act in bad faith, and the Appeals Court affirmed the summary judgment. In the instant case, the opposite is true. In the case at bar, the District Court found that Gregori acted in bad faith and the Sixth Circuit affirmed this decision upon independent

review in its 1995 decision, *see* App. II at p. A-42. Therefore, the employer in *DeVoll* did not violate ERISA § 510, and *Devoll* is distinguishable as the employer herein, Gregori, violated ERISA § 510. Moreover, the *DeVoll* Appeals Court specifically held that the Devolls' arguments on appeal were supported by existing out of circuit caselaw, *see DeVoll*, 35 F.3d 408 (9th Cir.). On the other hand, the decision of the 1995 Sixth Circuit Appeals Court in the instant case did not find, as did the *DeVoll* Appeals Court, any merit to Gregori's appeal arguments. Additionally, the other two cases cited in support by the Court below, *see* App. I at p. A-8, are not on point, as neither case, directly or indirectly, addresses the issue of culpability as it relates to a ERISA § 510 claim and the remedies available through the enforcement clause of ERISA § 502(a)(3)(B).

## VI. CONCLUSION

The Court should grant certiorari to review the important issue of the standard of law to be applied in an ERISA § 502(g)(1) fee application. The district and circuit courts need guidance as to the standard that applies, and this Court should settle the existing conflict between the lower Courts on this issue. The fees decision of the Sixth Circuit is shortsighted and the reasoning of the Court below should be rejected as it undermines the purpose of the fee-shifting provision of ERISA § 502(g)(1). It improperly construes the standard of law resulting in the condonation of the offending party, and fails to provide necessary and appropriate equitable relief pursuant to the ERISA statute under review, § 502(g)(1).

The great importance of the issues presented herein for certiorari by this Honorable Court flows also from the statutorily inherent right of pensioners across America to be able to effectively obtain counsel, to secure access to

the federal courts, all of which is legislatively intended by Congress in its promulgation of the ERISA fee-shifting provision under § 502(g)(1). The Sixth Circuit fees decision does not serve the purpose of ERISA § 502(g)(1), and will cause a chilling effect on the right of plan participants to litigate.

Petitioner Schwartz respectfully prays a Writ of Certiorari issue from this Honorable Court to review the Judgment of the Sixth Circuit Court of Appeals and thereafter, upon hearing, that this Court reverse the decision of the Sixth Circuit and order that Petitioner be awarded appellate fees.

Respectfully submitted,

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*Attorney for Petitioner*
*Diane Alice Schwartz*

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## APPENDIX I

## UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| | | |
|---|---|---|
| DIANE A. SCHWARTZ, *Plaintiff-Appellant,* | ) | |
| *v.* | ) | |
| JOSEPH S. GREGORI, M.D.; JOSEPH S. GREGORI, M.D., INC., Individually and as Employer and Administrator of the Pension Plan and Trust, *Defendants-Appellees.* | ) | No. 97-4166 |

Appeal from the United States District Court
for the Northern District of Ohio at Youngstown.
No. 88-04136 – Peter C. Economus, District Judge.

Argued: September 24, 1998

Decided and Filed: November 20, 1998

Before: KENNEDY, WELLFORD, and BOGGS, Circuit Judges.

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### COUNSEL

**ARGUED:** Richard N. Schwartz, Youngstown, Ohio, for Appellant. Richard J. Thomas, HENDERSON, COVINGTON, STEIN, DONCHESS & MESSENGER, Youngstown, Ohio, for Appellees. **ON BRIEF:** Richard N. Schwartz, Youngstown, Ohio, for Appellant. Richard J. Thomas, Richard N. Selby, HENDERSON, COVINGTON,

STEIN, DONCHESS & MESSENGER, Youngstown, Ohio, for Appellees.

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## OPINION

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KENNEDY, Circuit Judge. Plaintiff, Diane A. Schwartz, appeals from the District Court's order denying her applications for appellate attorney's fees in this action for breach of fiduciary duty and discharge in retaliation for asserting rights pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"). For the reasons that follow, the judgment of the District Court is **AFFIRMED.**

### I.[1]

Joseph Gregori, a physician, hired Diane Schwartz in 1975 as an x-ray technician and office administrator when Gregori started his own practice, Joseph S. Gregori, M.D., Inc.[2] *See Gregori I,* 45 F.3d at 1018. In 1975, Gregori formed the Joseph S. Gregori, M.D., Inc. Employer's Pension Plan

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[1] The following facts are derived from our prior opinion in *Schwartz v. Gregori* ("*Gregori I*"), 45 F.3d 1017 (6th Cir.), *cert. denied,* 516 U.S. 819 (1995).

[2] Joseph Gregori and his corporation are hereinafter referred to as "the Gregori defendants".

and Trust Agreement.[3] Gregori and Schwartz both participated in the plan. On the advice of his financial planner, John Kuczek, Gregori invested $50,000 of the plan's assets in September, 1983, and an additional $108,500 in December, 1983, with a commodities investor, David Meek. The investment was made despite Kuczek's knowledge that Meek's business had been in operation for only nine months. *See Gregori I*, 45 F.3d at 1019. In addition, Kuczek was aware that Meek was young, had little college education, and had five different employers in a four-year period. *See Gregori I*, 45 F.3d at 1019 n.1. In 1987, Gregori and Kuczek learned that Meek had embezzled all of the invested funds. The parties stipulated that Schwartz's share of the loss amounted to $19,728.15. After direct negotiations failed, Schwartz's counsel demanded that Gregori reimburse her for the loss and threatened legal action if he did not comply. Following the demand, Gregori informed Schwartz that he would fire her if she sued him or force her to quit by reducing her hours. *See Gregori I*, 45 F.3d at 1019.

Schwartz filed suit against Joseph S. Gregori, M.D., Inc. on November 10, 1988, alleging breach of fiduciary duty. Soon thereafter, Gregori terminated Schwartz, asserting as reasons for her termination that he planned to scale back his practice, implement computerization, and involve his wife in the administration of the office. Following her termination, Schwartz added a breach of fiduciary claim against Kuczek and Gregori individually, and added a claim against the Gregori defendants for

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[3] Gregori individually served as trustee of the plan, and Gregori, Inc. served as administrator.

illegal discharge. *See Gregori I*, 45 F.3d at 1019. As relief, Schwartz sought back pay, reinstatement or front pay in lieu thereof, and damages for emotional distress. *See Gregori I*, 45 F.3d at 1019-20.

Following a bench trial, the District Court found all four defendants jointly and severally liable and awarded Schwartz $19,728.15. Regarding the retaliatory discharge claim, the court found that Gregori discharged Schwartz due to the lawsuit she filed to enforce her rights under the plan. Accordingly, the court held that the Gregori defendants retaliated against Schwartz in violation of ERISA. *See Gregori I*, 45 F.3d at 1020. While the court denied Schwartz emotional distress damages, the court awarded back pay of $59,764 and front pay of $42,443; the District Court concluded that reinstatement was not a feasible remedy in light of the hostility between the parties. In addition, the court awarded Schwartz $33,253 in attorney's fees for services rendered through the date of judgment. *See Gregori I*, 45 F.3d at 1020.

The Gregori defendants appealed to our Court[4] raising three issues relating to Schwartz's claim of retaliatory discharge: (1) whether § 510 of ERISA protects employees from retaliatory acts which are not intended to affect their benefit entitlement; (2) whether the District Court erred in finding that Schwartz was discharged because she filed a lawsuit; and (3) whether the District Court erred in awarding the remedies of front and back pay where ERISA permits the recovery of only equitable,

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[4] Kuczek also appealed and Schwartz cross-appealed but their appeals were dismissed pursuant to the parties' stipulation. *See Gregori I*, 45 F.3d at 1020 n.2.

not legal, remedies. Our Court affirmed the judgment against the Gregori defendants for retaliatory discharge and affirmed the award of front and back pay. The Gregori defendants' petition for rehearing before our Court and their petition for certiorari to the Supreme Court were both denied.

On February 14, 1995, Schwartz applied for an award of attorney's fees and costs to compensate attorney Robert S. Hartford for services rendered in connection with defending Gregori's appeal and pursuing Schwartz's cross-appeal. Hartford sought $43,365.05 in attorney's fees and $2,597.80 in costs. On October 18, 1995, plaintiff, through attorney Richard Schwartz, filed a motion seeking $38,587.50 in attorney's fees and $1,170.00 in costs related to Schwartz's response to Gregori's Petition for Writ of Certiorari to the Supreme Court. Both attorneys later supplemented their applications seeking payment for additional services rendered since the date of their initial filings.

The applications were referred to a magistrate judge who recommended an award of attorney's fees to Schwartz but an adjustment of the amounts claimed by both attorneys. Following objections filed by both parties, the District Court declined to adopt the Report and Recommendation of the magistrate judge. Instead, the District Court held that Schwartz was not entitled to attorney's fees. In so holding, the court relied largely on its finding that Gregori did not pursue his appeal in bad faith.

Schwartz now appeals from the District Court's order denying her motions for attorney's fees.

II.

Section 1132(g) of Title 29 confers broad discretion on a district court in making an award of attorney's fees in an ERISA action:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1).[5] Consequently, the decision of a district court to award attorney's fees under 29 U.S.C. § 1132(g)(1) will stand absent an abuse of discretion. *See Tiemeyer v. Community Mut. Ins. Co.*, 8 F.3d 1094, 1101-02 (6th Cir. 1993). In exercising its discretion, our Circuit requires the district court to consider the following factors in deciding whether to award attorney's fees:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

*Secretary of Dep't of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985). Because no single factor is determinative, the

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[5] This section permits recovery of attorney's fees in connection with both trial court litigation and appellate litigation. *See Secretary of Dep't of Labor v. King*, 775 F.2d 666, 670 (6th Cir. 1985).

court must consider each factor before exercising its discretion. *See Wells v. United States Steel*, 76 F.3d 731, 736 (6th Cir. 1996). "[A]n abuse of discretion exists only when the court has the definite and firm conviction that the district court made a clear error of judgment in its conclusion upon weighing relevant factors." *Foltice v. Guardsman Prods., Inc.*, 98 F.3d 933, 939 (6th Cir. 1996) (quoting *King*, 775 F.2d at 669), *cert. denied*, 117 S. Ct. 1312 (1997).

Our review of the five *King* factors leads us to the conclusion that the District Court did not abuse its discretion in denying plaintiff's motions for attorney's fees. With regard to the first factor, we must address the parties' disagreement over the manner in which it applies to appellate attorney's fees. Ms. Schwartz argues that, in determining the degree of the opposing party's culpability or bad faith, courts must examine the bad faith or culpability of the Gregori defendants in the underlying lawsuit; whereas, the appellees maintain that, because Schwartz seeks appellate fees and costs, courts should review whether the Gregori defendants pursued their appeal in bad faith. Logic dictates the answer to this question; where an appellee seeks attorney's fees and costs for services performed in connection with defending an appeal, we review whether the appellant pursued this appeal in bad faith and not whether the appellant's conduct which resulted in litigation warrants a finding of bad faith or culpability. *See DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 414 (9th Cir. 1994) (attorney's fees not awarded for appellate work because "[a]ppellants' claims were neither frivolous nor made in bad faith, and were supported by existing out-of-circuit law or good faith arguments to extend, modify, or reverse the law of this

Circuit"); *Operating Eng'rs Pension Trusts v. B & E Backhoe, Inc.*, 911 F.2d 1347, 1357 (9th Cir. 1990) (attorney's fees for appellate work not awarded to appellees because appellants did not "appeal the decision below in bad faith"); *Nachwalter v. Christie*, 805 F.2d 956, 962 (11th Cir. 1986) (attorney's fees for appellate work not awarded because defendant-appellant's "claim was neither frivolous nor pursued in bad faith").

In the instant case, we agree that the first factor weighs in favor of the Gregori defendants. While the defendants raised three issues on appeal, the parties have primarily focused on whether the issue concerning the award of front pay and back pay was pursued in bad faith.[6] We agree with the defendants that their pursuit of this issue on appeal was not in bad faith. As acknowledged by our Court in the *Gregori I* opinion, 45 F.3d at 1021, the intervening Supreme Court decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), necessitated revisiting the question of whether back and front pay constituted legal or equitable remedies. While our Circuit had previously sanctioned awards of back pay in ERISA § 510 actions, *Mertens* held that compensatory damages were not permitted in ERISA § 502(a)(3) actions thereby requiring our Circuit to determine whether back and front pay are a form of compensatory damages. *See Gregori I*, 45 F.3d at 1021-22. Thus, the Gregori defendants pursued an issue which had to be newly addressed by

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[6] While the Gregori defendants raised two other issues on appeal, neither party has argued that the issues ought to be considered individually and attorney's fees awarded only for those issues satisfying the *King* factors.

our Circuit. In addition, while the Third Circuit has since similarly concluded that back pay is an equitable remedy, *see In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 57 F.3d 1255, 1269 (3d Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996), the question of whether front and back pay were permissible relief for ERISA violations post-*Mertens* was not answered by any other circuit. For these reasons, the District Court was entitled to conclude that the defendants' appeal to our Court and its petition for writ of certiorari were not pursued in bad faith.

Proceeding to the second factor, the ability of the defendants to satisfy an award of fees, both parties agree as to the substance of the evidence presented at a hearing before the District Court: two of Gregori's businesses filed for Chapter 7 bankruptcy; Gregori has incurred significant indebtedness and was, therefore, on the verge of filing personal Chapter 7 bankruptcy. Gregori acknowledged, however, that he remains a practicing physician, that he retains an interest as a creditor in two corporations, and that as a partner in a real estate venture, $400,000 in notes is due to his Investment Retirement Account. Two of the notes totaling approximately $65,000 were due at the end of 1996, three totaling approximately $200,000 were due at the end of 1997 and two totaling approximately $130,000-$150,000 are due at the end of 1998. Reviewing this evidence, the District Court concluded that the testimony did not support the magistrate judge's conclusion that there may be avenues by which Schwartz could collect from Gregori. We agree and therefore find that this factor also weighs in favor of precluding an award of attorney's fees.

The third factor, the deterrent effect of an award on other persons under similar circumstances, weighs in favor of the defendants. We agree with the District Court that a party contemplating appeal of a unanswered legal question regarding ERISA with general applicability, such as here, ought not to be deterred for fear of an attorney's fees award. While in this case the only beneficiary of a successful appeal was defendant, in most cases other beneficiaries of the plan are protected by the appellate process.

The fourth factor does not weigh in favor of awarding attorney's fees because Schwartz did not seek to confer a common benefit on all participants and beneficiaries of an ERISA plan or seek to resolve significant legal questions regarding ERISA.

Lastly, we consider the relative merits of the parties' positions. Both the magistrate judge and the District Court concluded that the merit of Schwartz's position on appeal did not significantly outweigh that of the defendants. While the Gregori defendants ultimately did not prevail on the merits in our Court, both reviewing judges agreed that the issue concerning ERISA remedies that Gregori raised on appeal was a novel and complicated one which required significant discussion by our Court to resolve. We do not disagree with that assessment.

Our review of all five of the *King* factors reveals that no one factor or combination of factors weighs heavily in favor of awarding appellate attorney fees to Schwartz. We, therefore, cannot conclude that the District Court abused its discretion in denying plaintiff's motions for attorney's fees.

## III.

For the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

**97-4166**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| DIANE A. SCHWARTZ,<br>Plaintiff-Appellant,<br>v.<br>JOSEPH S. GREGORI, M.D., ET AL.,<br>Defendants-Appellees. | ) | ORDER<br>(Filed Dec. 23, 1998) |

**BEFORE:** KENNEDY, WELLFORD, and BOGGS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY**
**ORDER OF THE COURT**

/s/ Leonard Green
**Leonard Green, Clerk**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

| | | |
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| DIANE SCHWARTZ | ) | CASE NO. 4:88CV4136 |
| PLAINTIFF | ) | JUDGE |
| V. | ) | PETER C. ECONOMUS |
| JOSEPH GREGORI, et al. | ) | MEMORANDUM OPINION AND ORDER |
| DEFENDANTS | ) | (Filed Sep. 26, 1997) |

This matter is before the Court upon the Objections to the Report and Recommendation of Magistrate Judge James D. Thomas on the issue of Plaintiffs Motions for Attorneys' Fees (Dkt. ##136, 143) in appellate proceedings.

The first motion requests $43,365.05 in attorneys' fees and $2,597.80 in costs for the work done by Nadler, Nadler & Burdman Co., L.P.A. with respect to the appeal and cross-appeal to the Sixth Circuit Court of Appeals. The second motion requests $38,587.50 in attorneys' fees and $1,170.00 in costs for the preparation of Plaintiff's response to Joseph S. Gregori's Petition for Writ of Certiorari to the United States Supreme Court by Attorney Richard N. Schwartz. This matter was then referred to Magistrate Judge James D. Thomas for a Report and Recommendation.

In his Report and Recommendation (Dkt #170), Magistrate Judge Thomas recommended an award of $47,308.05 in fees and $3,862.34 in costs to the law firm of Nadler, Nadler & Burdman Co., L.P.A. for the advocacy

before the Sixth Circuit. Magistrate Judge Thomas also awarded Attorney Schwartz $10,500.00 in attorneys fees and $1,240.00 in costs for the advocacy before the United States Supreme Court. Objections were then filed by Schwartz (Dkt. #171) and Gregori (Dkt. #173).

## PROCEDURAL HISTORY

Plaintiffs complaint set forth two separate causes of action:

> 1. Breach of fiduciary duty, based on investments the Defendants had made with portions of a pension plan in which Plaintiff was a participant; and
>
> 2. Discharging Schwartz in retaliation for asserting her rights under the Employee Retirement Income Security Act of 1974 ("ERISA") in bringing this action.

Judge Frank J. Battisti entered judgment against all of the Defendants on the first cause of action in the amount of $19,728.15 for the loss suffered by the pension plan and $10,077.00 in pre-judgment interest. Judge Battisti also entered judgment against Gregori on the wrongful discharge portion of the action for $59,764.00 in back pay and $42,443.00 in front pay. Finally, Judge Battisti entered judgment against all of the Defendants for Schwartz's attorneys' fees relative to the District Court portion of the action.

Gregori and Kuczek appealed to the United States Court of Appeals for the Sixth Circuit. Before the matter was heard by the Sixth Circuit, Kuczek settled with Plaintiff relative to the first cause of action. Plaintiff was paid

$30,194.85 in attorneys fees and costs and $29,805.15 in damages related to the pension plan loss and pre-judgment interest. The appeal continued with respect to the wrongful discharge claim against Gregori.

Gregori's arguments were based on Supreme Court precedent which suggests that monetary damages such as back pay and front pay are not available in actions for wrongful discharge under ERISA. Although numerous courts, including the Supreme Court, have previously held that compensatory money damages are not available under ERISA, no appellate court had yet addressed the issue of whether this precluded back pay and front pay in connection with a wrongful discharge claim.

The Sixth Circuit Court of Appeals affirmed Judge Battisti's decision that Gregori was liable to Plaintiff for both front pay and back pay. Gregori moved for rehearing en banc, which was denied. Gregori then filed a Petition for Writ of Certiori in the United States Supreme Court which Plaintiff opposed, and which the Supreme Court ultimately denied.

## ATTORNEYS' FEES AND COSTS

ERISA provides for awards of attorneys fees in 29 U.S.C. § 1132(g)(1) which states, in pertinent part: (1) In any action under this title. . . . by a participant beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs action to either party.

In analyzing whether an award is appropriate, the Sixth Circuit considers the following five factors:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

*Wells v. U.S. Steel*, 76 F.3d 731, 736 (6th Cir. 1996) *quoting Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1301 (6th Cir. 1991). "No single factor is determinative. Rather the court should consider each before exercising its discretion." *Wells*, 76 F.3d at 736, *citing Armistead*, 944 F.2d at 1304.

This Court must undergo an independent analysis of the appellate level proceedings, in order to determine whether an award of appellate attorneys's fees is appropriate. In other words, the finding of "bad faith" which prompted Judge Battisti's fee award in the trial court proceedings is not relevant to the current matter. The current matter is before this Court on the completely separate issue of whether attorneys' fees should be awarded in connection with the appellate work performed by Schwartz' attorneys.

Upon *de novo* review, and considering the *Armistead* factors in the context of the appellate proceedings, the Court finds that Plaintiff is not entitled to an award of attorneys' fees incurred at the appellate stage.

With respect to the first factor, the Court's analysis of "bad faith" should center on the issues appealed, rather than the factual underpinnings of Plaintiffs original

causes of action. *See DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 414 (9th Cir. 1994) ("Appellant's claims were neither frivolous nor made in bad faith, and were supported by existing out-of-circuit law or good faith arguments to extend, modify, or reverse the law of this Circuit.").

With respect to Gregori's appeal of the wrongful discharge award, Gregori pursued a legitimate, unanswered legal question. The issue of whether back pay and front pay are "equitable relief," and therefore available under ERISA, had not been addressed by any Circuit. In characterizing the back pay awarded Plaintiff as an equitable remedy in the form of restitution, the trial court and court of appeals expressly rejected the recent holding of the Eleventh Circuit in *Waldrop v. Southern Company Services, Inc.*, 24 F.3d 152 (1994) (back pay in the context of discriminatory discharge cannot be characterized as the equitable remedy of restitution, but rather, constitutes compensatory money damages.) This characterization of back pay as equitable relief also places the Sixth Circuit's holding in the case in direct conflict with *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995), and *Setser v. Novack Investment Co.*, 638 F.2d 1137 (11th Cir.) *amended en banc*, 657 F.2d 962, *cert. denied*, 454 U.S. 1064 (1981). Moreover, the Sixth Circuit's holding is inconsistent with the Supreme Court's ruling that back pay of this type is not restitutionary, but rather, constitutes legal relief in the form of money damages. *Chauffers, Teamsters and helpers Union Local No. 391 v. Terry*, 494 U.S. 558 (1990).

Thus, this Court concludes that Gregori did not pursue his appeal in bad faith. Gregori appealed issues

which were complicated and novel, as demonstrated by the discussion in the Sixth Circuit's reported decision. *Schwartz v. Gregori*, 45 F.3d 1017, *cert. denied*, 116 S.Ct 77 (1995).

Having concluded that Gregori's appeal was not taken in bad faith, this Court also concludes that the remaining *Armistead* factors do not support a fee award. Gregori's ability to satisfy an award of attorneys' fees, the factor considered least compelling by this Court, does not favor such an award. At the evidentiary hearing, Gregori devoted a considerable amount of time to the issue of whether of his ability to pay for any award. Magistrate Thomas concluded that while Gregori's financial picture appears bleak, there may be avenues for Schwartz and her counsel to collect and non-payment does not appear to be a foregone conclusion. However, the evidence which prompted this conclusion is insufficient to warrant attorneys' fees.

Nor does the deterrent effect of an award on other person's under similar circumstances. In order to establish the allowance of fees pursuant to this factor, the Sixth Circuit required the moving party to "offer reason[s] for pursuing a policy of deterrence beyond that which we in effect always pursue when we hold an employer in breach of its agreements." *Armistead*, 944 F.2d at 1304. Certainly, this Court would not want to impugn a party for appealing a question of first impression to the Sixth Circuit. Plaintiff in the instant matter produces no such evidence to prompt this Court to grant an award of fees in lieu of this factor.

Furthermore, Schwartz did not seek to confer a common benefit on all participants of the plan or resolve significant legal questions regarding ERISA. Finally, this Court is not persuaded that the relative merits of the parties' positions warrants an award of attorneys' fees.

Therefore, Plaintiffs Motions for Attorneys' Fees (Dkt. ##136, 143) in the appellate proceedings are **DENIED**.

**IT IS SO ORDERED.**

/s/ Peter C. Economus
**PETER C. ECONOMUS,**
**UNITED STATES**
**DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| DIANE A. SCHWARTZ, | ) | CASE NO. 4:88CV4136 |
| Plaintiff, | ) | JUDGE |
| | ) | PETER C. ECONOMUS |
| JOSEPH S. | ) | |
| GREGORI, M.D., | ) | MAGISTRATE JUDGE |
| et al., | ) | THOMAS |
| Defendants. | ) | |

(Filed Jul. 23, 1997)

**REPORT AND RECOMMENDATION**

**I. Introduction.**

The above-referenced matter has been referred to the undersigned with regard to several pending attorney fee applications. *(See* Order of June 5, 1996, Docket No. 147). After several attempts to schedule an evidentiary hearing in this matter (*see, e.g.*, Docket Nos. 148, 151, 153, 155, and 156), a hearing on the attorney fee applications was conducted on September 25, 1996 with the following persons participating: Robert S. Hartford; Richard N. Schwartz on behalf of Plaintiff; and Richard J. Thomas on behalf of Defendants. Subsequent to the hearing, counsel filed additional materials with regard to the pending applications.

The pending attorney fee applications have been at issue for some time without a disposition by the undersigned. Movants on the pending fee applications filed a motion for prejudgment attachment and garnishment on July 22, 1997. (*See* Docket Nos. 168 and 169). The motion

was denied by United States District Judge Peter C. Economus by marginal entry on July 22, 1997. At the same time, this report and recommendation has been generated forthwith at the request of United States District Judge Peter C. Economus.[1]

## II. Background.

This case has an extensive background. This background discussion, however, focuses primarily on the procedural history with regard to attorney fees and notes the merits of the underlying dispute only briefly.[2]

On July 31, 1993, a judgment was entered in favor of the Plaintiff against Defendants. (*See* Docket Nos. 97 and 98). Plaintiff's fundamental claim was that Defendants, in particular Defendant Gregori,[3] breached his fiduciary duties under the Employee Retirement Income Security

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[1] The undersigned did not anticipate having this matter under advisement for such a long period of time. The undersigned apologizes to the parties and counsel for the delay. Furthermore, the undersigned regrets any embarrassment caused by the delay for the Court and, in particular, United States District Judge Peter C. Economus.

[2] In that regard, the reader's familiarity with the Order awarding Plaintiff attorney fees (Docket No. 127) filed on November 12, 1993 is assumed. In addition, the reader's familiarity with the opinion filed at *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 77 (1995), is also assumed

[3] Joseph S. Gregori, M.D. was sued individually. Joseph S. Gregori, M.D., Inc. was sued individually and as employer and administrator of the pension plan.

Act ("ERISA"), and discharged Plaintiff in retaliation for her exercise of ERISA rights.

The relevant parties were summarized by the Sixth Circuit as follows:

> Joseph Gregori, a physician, and Diane Schwartz, a licensed x-ray technician, met through their employment in 1971. In 1975, Gregori started his own practice, formed Joseph S. Gregori, M.D., Inc., and hired Schwartz as his office manager and x-ray technician.
>
> Defendant John Kuczek is a financial planner and insurance salesman, conducting business through Kuczek & Associates, Inc. Kuczek and Gregori are friends, and Kuczek performed financial planning services for Gregori. At Kuczek's suggestion, Gregori formed the Joseph S. Gregori, M.D., Inc. Employer's Pension Plan and Trust Agreement (the "plan") in 1975. Gregori individually served as trustee of the plan, and Gregori, Inc. served as administrator. Gregori, Schwartz and others were participants in the plan.

45 F.3d at 1018-1019. The action was initially instituted against Defendant Gregori and Defendants John J. Kuczek and Kuczek & Associates, Inc. (the latter two collectively, "Kuczek"). The dispute with Kuczek was resolved after trial. (*See* Docket No. 133).

The proceedings at trial were summarized by the Sixth Circuit as follows:

> The case was tried to the court. Extensive testimony was introduced on the breach of fiduciary duty claim, on which the district court found all four defendants jointly and severally liable,

> awarding Schwartz $19,728.15 together with prejudgment interest. With respect to the retaliatory discharge claim, Schwartz established that the reasons Gregori had given to justify her termination had not materialized; i.e., Gregori did not scale down his practice, did not computerize his office for three years, and involved his wife in the office for only a short time following Schwartz's discharge. Gregori testified at trial to additional reasons for Schwartz's termination, alleging incompetence, failure to perform duties, and failure to communicate and show initiative. The district court found that all of stated reasons were pretextual, and that Gregori's real reason for discharging Schwartz was her lawsuit to enforce her rights under the plan. Accordingly, the court found that the Gregori defendants retaliated against Schwartz in violation of ERISA. The court denied Schwartz emotional distress damages, and found that reinstatement was not a feasible remedy in light of the hostility between the parties. The court awarded back pay of $59,764, and front pay of $42,443. Finally, the court awarded Schwartz attorney fees of $33,253 for services rendered through the date of judgment.

45 F.3d at 1020.

On November 12, 1993, United States District Judge Battisti awarded, as noted in the quote above, the Plaintiff $33,253.50 in fees and $3,296.07 in costs. (*See* Docket No. 127). At trial, Plaintiff was represented principally by Robert Hartford and Timothy Reardon of the firm Nadler, Nadler & Burdman (hereinafter, collectively "Attorney Hartford").

The decision of the Sixth Circuit affirming the trial court on the merits was filed on January 31, 1995. *Schwartz*, 45 F.3d 1017.

On February 14, 1995, Attorney Hartford filed an "Application for Additional Attorney Fee and Costs of Action" (Docket No. 136) for the time period of August 5, 1993 through January 31, 1995. In this application, Mr. Hartford and his firm sought an attorney fee award in the amount of $43,365.05 and costs in the amount of $2,597.80 for the time period in question. Defendant Gregori opposed the additional request and, on February 24, 1995, filed "Defendant Gregori's Memorandum in Opposition to Plaintiff's Petition for Additional Attorneys' Fees and Costs" (Docket No. 137). Defendant asserted three objections to Mr. Hartford's additional request: (1) that Mr. Hartford's present application for time devoted to an appeal should be submitted to the Court of Appeals[4]; (2) applying the relevant five-part test, Mr. Hartford was not entitled to an additional award; and (3) that the Plaintiff should not be entitled to time devoted to settlement with co-defendant Kuczek.

On March 20, 1995, Attorney Hartford filed a "Supplemental Authority in Support of Application for Additional Attorney Fee and Costs of Action" (Docket No. 138) responding to the three arguments advanced by Defendant Gregori in his February 24, 1995 filing. Mr. Hartford responded, in order, that this court has the power to address the fee applications subsequent to the

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[4] The first argument was not seriously pursued by Mr. Thomas at the hearing.

district court; that Plaintiff meets the five-part test as originally determined by Judge Battisti in his initial attorney fee award; and that Defendant Gregori benefitted from the settlement with Kuczek because the negotiated settlement relieved Defendant Gregori of judgments in excess of sixty thousand dollars. This later argument was fleshed out in greater detail at the evidentiary hearing conducted on September 25, 1996.

On May 15, 1995, Attorney Hartford filed a "Supplemental Application for Additional Fee and Costs of Action" (Docket No. 141) for the time period of February 1, 1995 through April 13, 1995. In this May 15, 1995 application, Attorney Hartford requested fees in the amount of $2,454.00 and costs in the amount of $205.33.

On October 18, 1995, Attorney Richard Schwartz filed an "Application for Award of Attorney's Fees for Representation before the Supreme Court of the United States" (Docket No. 143). Mr. Schwartz assumed the representation of Ms. Schwartz before the United States Supreme Court on the application for certiorari filed by Defendant Gregori.[5] In his October 18, 1995 application, Mr. Schwartz seeks an award of attorney fees in the amount of $38,587.50 and costs in the amount of $1,170.00 "for legal representation before the U.S. Supreme Court." (Docket No. 143 at p. 1).

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[5] The billing records submitted by Mr. Schwartz reflect that his representation of Plaintiff commenced on June 13, 1995. (*See* Docket No. 143, Exhibit C, p. 1). The application for writ of certiorari was filed on June 12, 1995.

On November 17, 1995, Defendant Gregori filed a response to Mr. Schwartz's October 18, 1995 application. (*See* "Defendant Gregori's Memorandum in Opposition to Plaintiff's Petition for Additional Attorney Fees and Costs" (Docket No. 144)). On November 27, 1995, Attorney Schwartz filed a "reply" to Defendant's opposition to the fees requested by Schwartz. (*See* "Plaintiffs Response to Defendant Gregori's Objection to Plaintiff's Application for Attorney Fees Before the U.S. Supreme Court" (Docket No. 145)).

On September 24, 1996, Mr. Schwartz filed a "Supplemental Application for Additional Attorney's Fees" in which he sought reimbursement for the time period of October 18, 1995 through September 25, 1996. (Docket No. 158). In the September 24, 1996 application, Attorney Schwartz claims a fee in the amount of $1,762.00 and $70.00 in additional costs.[6]

At the conclusion of the hearing, the undersigned requested several additional items from counsel, including: a copy of Defendant's brief filed before the United States Supreme Court in connection with the application for certiorari; a copy of Defendant's brief filed before the Sixth Circuit Court of Appeals; the deposition of Defendant's expert; an affidavit from Mr. Thomas regarding the rate and hours devoted by Defendant on this matter; and any updated fee applications from Mr. Schwartz and Mr. Hartford for the time expended through the date of the hearing. Copies of the requested briefs were submitted

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[6] Mr. Schwartz also requested attorney fees for the September 25, 1996 hearing but listed no specific dollar amount.

directly to the undersigned's chambers and the remaining items are at Docket Nos. 163, 165, 166, and 167. Defendant also filed a post hearing memorandum at Docket No. 162.

The materials filed subsequent to the hearing and the filings summarized above have all been considered in connection with the recommended decision on the pending fee applications.

## III. Discussion.

As noted above, Mr. Hartford represented Plaintiff at trial court and on appeal before the Sixth Circuit Court of Appeals. Mr. Schwartz's time was devoted primarily to the application for certiorari filed before the United States Supreme Court. Accordingly, the fees requested by each lawyer, Mr. Hartford and Mr. Schwartz, are addressed separately. Before turning to the amounts claimed, however, the initial question is whether an award is warranted in the first instance.

### A.

There is general agreement among the parties that a five-part test applies in evaluating claims for attorney fees in cases of the nature before the court. Mr. Schwartz, Mr. Hartford, and Defendant Gregori all cite the same five-part test. Each lawyer also provided argument on each factor at the hearing conducted on the pending fee applications.

In *Firestone Tire & Rubber Company v. Neusser*, 810 F.2d 550 (6th Cir. 1987), the Sixth Circuit outlined the five factor test. The Sixth Circuit stated:

> This court has recently considered the appropriate standards for awarding attorney's fees under 29 U.S.C. § 1132(g)(1):
>
> > Several courts have spelled out guidelines for district courts to apply when deciding whether to grant attorney's fees under ERISA. The courts have mentioned the following five factors: (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions. . . .
>
> *Secretary of Department of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985) (per curiam.) (citations omitted). **The decision to award attorney's fees is within the broad discretion of the trial court, and "an abuse of discretion exists only when the court has the definite and firm conviction that the district court made a clear error of judgment in its conclusion upon weighing relevant factors."** *Id.*

810 F.2d at 556-557 (emphasis in bold supplied).

The same five-part test was employed by Judge Battisti when he considered Mr. Hartford's first application

for fees expended before any appeals. (*See* Docket No. 127, pp. 2-3.) Judge Battisti found:

> All of the factors mentioned by the Sixth Circuit in . . . support the award of attorney's fees in this case. As detailed in the Findings of Fact and Conclusions of Law in the July Order, the Defendants breached their fiduciary duty to the Plaintiff and compounded their bad faith by unlawfully discharging her. Furthermore, the denial of fees will require the Plaintiff to use her benefits to pay her attorneys. This will unfairly force her to pay for Defendants' repeated misconduct. Finally, imposing fees and costs on the Defendants serves the other members of the ERISA plan because it may cause Defendants, as plan administrator, to act more equitably in evaluating future responsibilities.

(Docket No. 127, p. 3.) The parties have devoted a considerable amount of argument in the papers and at the hearing regarding the weight which should be accorded each factor. In considering those arguments, the undersigned shares in the conclusion reached by Judge Battisti.

When a court evaluates the five factors, the Sixth Circuit cautions that "[n]ot all the factors will be relevant in a given case, and no single factor is necessarily dispositive." *Firestone Tire & Rubber*, 810 F.2d at 558 (citations omitted). In this case, no one factor is dispositive.[7] On balance, however, an award is warranted.

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[7] Defendant's expert, Mr. Baughman, testified, by way of deposition, that he was of the opinion that Plaintiff was not entitled to an award of fees based upon the five-part test. (Baughman Deposition at p. 42). Mr. Baughman, however, focused on only two of the five factors. (*Id.*)

For example, Plaintiff focuses on the conduct of Defendant Gregori which gave rise to this action as evidence of bad faith or culpability. Defendant Gregori argues that the focus should not be on Defendant's actions at the outset but rather on his actions on appeal. In this regard, according to Defendant Gregori, he simply pursued legitimate legal avenues of appeal and demonstrated no bad faith or culpable conduct in pursuing the appeals. From a review of the reported appellate decision there is nothing which indicates that Defendant Gregori pursued the appeal in bad faith. At the same time, his liability, or culpability, was affirmed by the court of appeals. The liability finding, as noted by Judge Battisti, was based on "bad faith."

The relative merits of the position of the parties is also a relevant factor. On this point, the undersigned heard considerable argument with regard to the merits of the certiorari application. Mr. Schwartz cited and reviewed several cases on the issue the Supreme Court was invited to address. Similarly, Mr. Thomas offered his view on the issue as well. A complete review of the views expressed is not necessary. It is not this court's function to review the certiorari ruling or the reasons for rejecting the application, particularly when the Supreme Court gave no reasons for denying the application. It is fair, however, to say that, based on the undersigned's review, the issue was a complicated and novel one – there was no clear answer and each party had an argument as demonstrated by the discussion in the Sixth Circuit's reported decision.

The deterrent effect of an award is a compelling factor here. As the record reflects, the plan was

established by, in essence, a small business owner who failed to fulfill his fiduciary duties to the plan. To require the payment of fees in such a circumstance sends a strong message to those similarly situated that the duties of a fiduciary should be carried out without fail. This deterrent component is particularly relevant in light of the fact that Plaintiff was only one of a few members of those participating in the plan.[8]

At the evidentiary hearing, Defendant Gregori devoted a considerable amount of time to the issue of his ability to pay for any award. Defendant Gregori argued that his current financial condition will not allow him to pay any fee award. As support, Defendant Gregori offered evidence of an impending bankruptcy, liquidation of equipment, and extensive indebtedness. At the same time, Mr. Hartford elicited testimony that Defendant Gregori still retains interests in certain limited partnerships which may have the potential for income generation. Further, Defendant Gregori testified that he is continuing with his medical practice, albeit in a different corporate form and professional affiliation. Taken together, while Defendant Gregori's financial picture appears bleak, there may be avenues for Plaintiff and her counsel to collect and non payment does not appear to be a forgone conclusion.[9]

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[8] The common benefit to others in the plan is not a relevant factor because there were so few participants in the plan.

[9] In this regard, Defendant Gregori testified, again on cross examination, that he spent approximately $12,000.00 in attorney fees and expenses defending the pending applications.

In sum, considering the relevant factors, the arguments advanced at the hearing and in the papers, and the evidence presented, an award for reasonable fees and costs incurred by Plaintiff and her respective attorneys defending the judgment of the trial court on appeal is warranted.

B.

As noted above, the separate requests of Mr. Hartford and Mr. Schwartz are addressed in turn.

(i)

The sum of the three applications filed by Mr. Hartford subsequent to the initial award is $51,557.55 in fees and $3,862.34 in costs. (*See* Docket Nos. 136, 141 and 167). This sum is in addition to the initial award of $33,253.50 in fees and $6,099.20 in costs awarded by Judge Battisti.

Defendant Gregori attacks the total amount claimed by Mr. Hartford only to the extent that Mr. Hartford seeks reimbursement for fees associated with the settlement of the claims against Kuczek. (*See* Docket No. 137, p. 11). Defendant Gregori does not question the hourly rate charged by Mr. Hartford and his associates or the time devoted to the relevant tasks. In this regard, Defendant's expert agreed that the time devoted by Mr. Hartford and his firm was reasonable. He also believed that the rates were within a reasonable range. (*See* Baughman Deposition at pp. 40-42).

According to Defendant Gregori, however, at least $4,249.50 of the claimed amount in the February 14, 1995

application is attributable to negotiating the settlement with Kuczek. As such, Defendant Gregori argues that he should not be responsible for fees devoted to the settlement of claims against a co-defendant. Mr. Hartford argues that the settlement with Kuczek benefitted Defendant Gregori because it relieved Defendant Gregori of a portion of the judgment for which all defendants were found to be jointly and severally liable. Thus, according to Mr. Hartford, it is reasonable to make Defendant Gregori responsible for those fees. The undersigned does not agree.

While it is true that Defendant Gregori did benefit to the extent the ultimate judgment was reduced, Plaintiff elected to compromise part of her claim, at least with regard to Kuczek. To allow Plaintiff to recover the cost of negotiating away a portion of her claim from the nonsettling co-defendant is inconsistent with what the undersigned understands of the settlement of the Kuczek claim. The settlement left open Defendant Gregori's liability for fees on appeal but not necessarily fees for the settlement of a co-defendant. Accordingly, Mr. Hartford's February 14, 1995, application should be reduced by $4,249.50.

In sum, and as set forth in Appendix I, Attorney Hartford's pending applications should be granted in the amount of $47,308.05 in fees ($51,557.55 less $4,249.50) and $3,862.34 in costs.[10]

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[10] The recommended award herein is in addition to the previous award of $33,253.50 in fees and $6,099.20 in costs awarded on November 12, 1993 by Judge Battisti.

(ii)

The sum of the two applications filed by Mr. Schwartz is $40,349.50 in fees and $1,240.00 in costs. (*See* Docket Nos. 143 and 158). The time period for the fees and costs claimed by Mr. Schwartz is June 13, 1995 through the date of the evidentiary hearing, September 25, 1996.

Defendant Gregori attacks the total amount claimed by Mr. Schwartz on the grounds that Mr. Schwartz's billing statements lack sufficient detail and the amount claimed is clearly excessive. (*See* Docket No. 144, pp. 7-9). Upon review of the statements and in light of the billing statements submitted by Mr. Thomas and Mr. Hartford, the undersigned agrees.

The level of detail reflected in the billing statements submitted by Mr. Schwartz is simply inadequate. One need only compare the statements of Mr. Schwartz to the statements submitted by Mr. Hartford to appreciate the lack of detail reflected in Mr. Schwartz's statements. As noted by Defendant Gregori, many of Mr. Schwartz's entries reflect only the time devoted to the task and an extremely brief description of the task, such as "brief writing" or "research." The undersigned need not cite any case law in support of the proposition that such entries in support of a request for an award of attorney fees are inadequate.

Further, the hourly rate claimed by Mr. Schwartz finds no support in the record. Mr. Schwartz offered no evidentiary support for the claimed rate of $150.00 an hour. When asked at the hearing by the undersigned, Mr. Schwartz indicated that he has no set or standard hourly rate at which he charges his clients. In addition to the

lack of any evidence to support the claimed hourly rate, the rate is not in line with the rates reflected in the statements provided by Mr. Hartford and Mr. Thomas. Mr. Hartford's statements reflect a range of $100.00 to a high of $135.00. Mr. Thomas's statements reflect a range of $100.00 to a high of $125.00. Mr. Schwartz's claimed rate of $150.00 per hour is simply not credible in light of the lack of any evidentiary basis for the rate and as compared with the other lawyers in this case who practice in the same legal community.

Furthermore, in an effort to put the total amount claimed by Mr. Schwartz in context, the undersigned has compared the amount claimed by Mr. Schwartz to the fees incurred by others for the different portions of this case.[11] For example, the total fees claimed by Mr. Schwartz of $40,349.50 represents approximately 93% of the fees claimed by Mr. Hartford for the entire appeal before the Sixth Circuit.[12] The appeal before the Sixth Circuit required the examination of the record, preparation of an appendix, a principal brief, a reply brief, and oral argument. In comparison, the defense to the application for certiorari involved one brief with no oral argument or additional briefs. The total fees claimed by Mr. Schwartz of $43,349.50 also represents approximately 121% of the time devoted by Mr. Hartford, and his associates, for the

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[11] The total number of hours claimed is approximately 257.25 hours. (Docket No. 143, Exhibit C.)

[12] The 93% figure represents the $40,349.50 claimed by Mr. Schwartz divided by the amount reflected in Mr. Hartford's February 14, 1995 application, i.e., $40,349.50/$43,365.05 = .930 or 93%.

entire trial.[13] Finally, a review of the affidavit file by Mr. Thomas (Docket No. 166) reveals that Mr. Thomas, and his associates, expended approximately $10,406.25 in attorney fees in connection with the work before the United States Supreme Court.[14] The total fees claimed by Mr. Schwartz of $43,349.50, therefore, represents approximately 387% of the approximate fee incurred by Defendant before the United States Supreme Court.[15]

Thus, in context and by way of comparison, the fees claimed by Mr. Schwartz in connection with the work before the United States Supreme Court are excessive. Thus, the request for the claimed amount of $40,349.50 in attorney fees should be denied.

The more difficult question is what is a reasonable award for Plaintiff for the work defending the application for certiorari. Defendant's expert was of the opinion that

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[13] The 121% figure represents the $40,349.50 claimed by Mr. Schwartz divided by the amount awarded by Judge Battisti for the trial work performed by Mr. Hartford, i.e., $40,349.50/$33,253.50 = 1.21 or 121%.

[14] The amount reflects the undersigned's calculation of the time and hourly rates reflected in the Affidavit of Richard Thomas at Docket No. 166. The calculated amount includes: 78.75 hours for Richard N. Selby at a rate of $100.00 per hour or $7,875.00; and, 20.25 hours for Richard Thomas at a rate of $125.00 an hour or $2,531.25.

[15] The 387% figure represents the $40,349.50 claimed by Mr. Schwartz divided by the calculated amount set forth in the previous footnote of $10,406.25, i.e., $40,349.50/$10,406.25 = 3.87 or 387%.

a reasonable rate for the work performed by Mr. Schwartz would be $7,500.00. (Baughman Deposition at p. 11).[16] As noted above, Mr. Thomas's firm incurred fees in the approximate amount of $10,250.00. Considering these amounts as guideposts, the arguments of counsel, and the evidence presented, an award of $10,500.00 in attorney fees on Mr. Schwartz's pending applications is reasonable.

Defendant Gregori does not seriously attack Mr. Schwartz's claim for costs. Accordingly, the claimed costs in the amount of $1,240.00 should be awarded.

In sum, and as set forth in Appendix II, Attorney Schwartz's pending applications should be granted in the amount of $10,500.00 in fees and $1,240.00 in costs.

## IV. Conclusion.

For the reasons set forth above:

(1) an award for reasonable fees and costs incurred by Plaintiff and her respective attorneys defending the judgment of the trial court on appeal is warranted;

(2) Attorney Hartford's pending applications should be granted in the amount of $47,308.05 in fees and $3,862.34 in costs (*see* Appendix I); and

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[16] Mr. Baughman also believed the rate of $150.00 was "somewhat high for a person who doesn't specialize in appellate work and is in a smaller firm setting. . . . " (Baughman Deposition at p. 12). Mr. Baughman, nonetheless, based his $7,500.00 opinion on the $150.00 rate for 50 hours of time. *Id.*

(3) Attorney Schwartz's pending applications should be granted in the amount of $10,500.00 in fees and $1,240.00 in costs *(see* Appendix II).

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided in 28 U.S.C. § 636(b)(1) and Local Rule 72.3(b). Failure to file objections constitutes a waiver of any further right of appeal. *Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Howard v. Secretary of HHS,* 932 F.2d 505 (6th Cir. 1991); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

Pursuant to Local Rule 72.3(b), objections, if any, to this Report and Recommendation shall be filed with the Clerk of Court and served on the United States Magistrate Judge and all parties. Any response to such objections shall be filed and served in a similar manner.

SIGNED and ENTERED on this 23rd day of July, 1997.

/s/ James D. Thomas
JAMES D. THOMAS
United States
Magistrate Judge

Attorney Hartford

| Application Date/Docket | Time Period | Amount Claimed Fees | Amount Claimed Costs | Amount Awarded Fees | Amount Awarded Costs |
|---|---|---|---|---|---|
| Feb. 14, 1995 (Docket No. 136) | 8/5/93 to 1/31/95 | $43,365.05 | $2,597.80 | $39,115.55 | $2,597.80 |
| May 15, 1995 (Docket No. 141) | 2/1/95 to 4/13/95 | $2,454.00 | $205.33 | $2,454.00 | $205.33 |
| Oct. 4, 1996 (Docket No. 167) | 4/14/95 to 9/30/96 | $5,738.50 | $1,059.21 | $5,738.50 | $1,059.21 |
| TOTALS: | | $51,557.55 | $3,862.34 | $47,308.05 | $3,862.34 |

APPENDIX I

Case No. 4:88CV4136

Attorney Schwartz

| Application Date/Docket | Time Period | Amount Claimed Fees | Amount Claimed Costs | Amount Awarded Fees | Amount Awarded Costs |
|---|---|---|---|---|---|
| Oct. 18, 1995 (Docket No. 143) | 6/13/95 to 10/18/95 | $38,587.50 | $1,170.00 | $ ---------- | $1,170.00 |
| Sept. 24, 1996 (Docket No. 158) | 10/18/95 to 9/24/96 | $1,762.00 | $70.00 | $ ---------- | $70.00 |
| TOTALS: | | $40,349.50 | $1,240.00 | $10,500.00 | $1,240.00 |

APPENDIX II

## APPENDIX II

## SUPREME COURT OF THE UNITED STATES

## OFFICE OF THE CLERK

## WASHINGTON, D. C. 20543

October 2, 1995

Ms. Richard N. Schwartz
219 W. Boardman Street
Youngstown, OH 44503

Re: Joseph S. Gregori, et al.
v. Diane A. Schwartz
No. 94-2035

Dear Ms. Schwartz:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter, Clerk

Diane A. SCHWARTZ, Plaintiff-Appellee,

v.

Joseph S. GREGORI, M.D.; Joseph S. Gregori, M.D., Inc., Individually and as Employer and Administrator of Pension Plan and Trust, Defendants-Appellants,

John J. Kuczek and Kuczek & Associates, Inc., Defendants.

No. 93-3964.

United States Court of Appeals, Sixth Circuit.

Argued Nov. 29, 1994.

Decided Jan. 31, 1995.

Rehearing and Suggestion for Rehearing En Banc Denied March 17, 1995.

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Robert Samuel Hartford (argued and briefed), Timothy M. Reardon (briefed), Nadler, Nadler & Burdman, Youngstown, OH, for plaintiff-appellee.

Richard J. Thomas (argued and briefed), Richard N. Selby (briefed), Henderson, Covington, Stein, Donchess & Messenger, Youngstown, OH, for defendants-appellants.

Before: MILBURN and SUHRHEINRICH, Circuit Judges; and JOINER, District Judge.*

JOINER, District Judge.

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* The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

Defendants Joseph S. Gregori and Joseph S. Gregori, M.D., Inc., appeal the judgment in favor of plaintiff Diane Schwartz for breach of fiduciary duty and retaliatory discharge under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq. The district court awarded Schwartz damages to compensate her for the financial losses caused by defendants' breach of fiduciary duty, together with prejudgment interest; back pay and front pay for retaliatory discharge; and attorney fees. The Gregori defendants challenge their liability for retaliatory discharge and the award of back pay and front pay. We affirm.

I.

Joseph Gregori, a physician, and Diane Schwartz, a licensed x-ray technician, met through their employment in 1971. In 1975, Gregori started his own practice, formed Joseph S. Gregori, M.D., Inc., and hired Schwartz as his office manager and x-ray technician.

Defendant John Kuczek is a financial planner and insurance salesman, conducting business through Kuczek & Associates, Inc. Kuczek and Gregori are friends, and Kuczek performed financial planning services for Gregori. At Kuczek's suggestion, Gregori formed the Joseph S. Gregori, M.D., Inc. Employer's Pension Plan and Trust Agreement (the "plan") in 1975. Gregori individually served as trustee of the plan, and Gregori, Inc. served as administrator. Gregori, Schwartz and others were participants in the plan.

Gregori had no investment experience, and relied on Kuczek to make decisions for the plan. In 1983, Kuczek

learned of a commodities investor, David Meek, whose funds supposedly were earning as much as 30 percent. Kuczek recommended to Gregori that the plan invest in Meek's funds. Gregori followed Kuczek's advice, investing $50,000 of plan assets in September 1983, and an additional $108,500 in December 1983. The latter investment was made following Kuczek's "due diligence" visit to Meek's office in Florida, where he learned that Meek's business had been in operation for only nine months.[1] Following the December investment, the amount invested in Meek's funds represented 45.6 percent of the total plan assets.

Meek issued weekly statements for a period of time which indicated that the funds were performing well. Over the next year, Gregori and Kuczek received two notices disclosing that Meek was a defendant in an action brought by the Commodities Futures Trading Commission (CFTC), and that an injunction had been issued requiring Meek to allow the CFTC to have access to the books and records of one of his funds. On both occasions, Kuczek called Meek and was assured that the problem was an inadvertent one which was being remedied. Kuczek did not confirm Meek's report with the CFTC or recommend that the plan's assets be withdrawn.

Meek stopped issuing weekly statements in July 1985, and shortly thereafter the CFTC froze all of his

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[1] Kuczek also was aware that Meek was 29 years old, had only two weeks of college education, and had worked for five different employers between 1977 and 1981. Kuczek did not contact any of Meek's former employers prior to recommending the investment to Gregori.

accounts. In 1987, Gregori and Kuczek learned that Meek had embezzled all of the invested funds, and that the weekly reports were fictitious. The parties stipulated that the total loss to the plan was $288,991.09, and that Schwartz's share of the loss was $19,728.15. Kuczek offered to make restitution to the plan for the loss, but Gregori refused the offer and "forgave" Kuczek because he had not caused the loss intentionally. The plan was terminated on March 31, 1988, and Schwartz received a lump sum payment representing her share of the plan assets then in existence. This payment did not compensate Schwartz for the losses attributable to the Meek investment.

Schwartz and Gregori had several discussions during this time period regarding the plan's losses. Gregori offered to repay the lost funds to Schwartz in the form of bonuses over a three-year period, but Schwartz refused the offer because the bonuses would have been taxable as income in the years they were received, and could not have been invested in a qualified retirement plan. Through counsel, Schwartz demanded that Gregori reimburse her for the loss and threatened legal action. Gregori responded by telling Schwartz that she would be out of a job if she sued him. Gregori also threatened to force Schwartz to quit by reducing her hours.

Schwartz filed suit on November 10, 1988, and effected service on November 14. Within days, Gregori advertised for an x-ray technician. On November 22, Gregori sent his attorney a draft letter terminating Schwartz, and asked the attorney to make necessary alterations or clarifications. Gregori terminated Schwartz on December 9, telling her that he planned to scale back his practice,

implement computerization, and involve his wife in the administration of the office.

Schwartz's original complaint asserted a breach of fiduciary duty claim against Gregori, Inc. only. Through amendment, Schwartz added a similar claim against the Kuczek defendants and Gregori individually, and added a claim against the Gregori defendants for illegal discharge, seeking back pay, reinstatement or front pay in lieu thereof, and damages for emotional distress.

The case was tried to the court. Extensive testimony was introduced on the breach of fiduciary duty claim, on which the district court found all four defendants jointly and severally liable, awarding Schwartz $19,728.15 together with prejudgment interest. With respect to the retaliatory discharge claim, Schwartz established that the reasons Gregori had given to justify her termination had not materialized; i.e., Gregori did not scale down his practice, did not computerize his office for three years, and involved his wife in the office for only a short time following Schwartz's discharge. Gregori testified at trial to additional reasons for Schwartz's termination, alleging incompetence, failure to perform duties, and failure to communicate and show initiative. The district court found that all of stated reasons were pretextual, and that Gregori's real reason for discharging Schwartz was her lawsuit to enforce her rights under the plan. Accordingly, the court found that the Gregori defendants retaliated against Schwartz in violation of ERISA. The court denied Schwartz emotional distress damages, and found that reinstatement was not a feasible remedy in light of the hostility between the parties. The court awarded back pay of $59,764, and front pay of $42,443. Finally, the court

awarded Schwartz attorney fees of $33,253 for services rendered through the date of judgment.

II.

The scope of this appeal has been narrowed considerably since it was first filed,[2] and the remaining issues concern Schwartz's claim of retaliatory discharge. An employee's rights under ERISA are set forth in § 510, 29 U.S.C. § 1140:

> It shall be unlawful for any person to *discharge*, fine, suspend, expel, discipline, or discriminate against *a participant* or beneficiary *for*

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[2] Pursuant to the parties' stipulation, this court dismissed the Kuczek defendants' appeal and Schwartz's cross-appeal. The Gregori defendants report that Schwartz's settlement with the Kuczek defendants has resolved the damage award for breach of fiduciary duty as well as district court's award of attorney fees. The Gregori defendants expressly have abandoned their challenge to the court's determination of the amount of the plan loss attributable to Schwartz and the award of prejudgment interest. They suggest that their challenges to the court's findings of breach of fiduciary duty and causation remain viable for preserving their right to seek attorney fees on appeal. The Gregori defendants have made no request for fees to date. We note, moreover, that the Gregori defendants' liability for breach of fiduciary duty and the resulting damage to Schwartz was clearly established by Gregori's refusal, contrary to the best interests of the plan participants, of Kuczek's offer to reimburse the plan. We find no clear error in the court's findings of fact on this issue, and reject Gregori's claim, unsubstantiated by competent evidence or legal authority, that the IRS would not permit a fiduciary to reimburse the plan for losses caused by his investments. 29 U.S.C. § 1109(a) (obligation of fiduciary to reimburse plan for losses caused by breach of fiduciary duty).

> *exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter,* section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], *or* for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. *The provisions of section 1132 of this title shall be applicable in the enforcement of this section.*

(Emphasis added.) The provision governing the relief available under ERISA is § 502, 29 U.S.C. § 1132(a), which provides in pertinent part:

> A civil action may be brought –
>
> . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

Gregori's challenges to liability for retaliatory discharge merit only brief discussion. Gregori contends that ERISA § 510 does not protect employees from retaliatory acts which are not intended to affect their benefit entitlement. Under his reading of the statute, Gregori claims

that he is not liable because the plan losses had been suffered long before Schwartz's discharge. Gregori relies on *Humphreys v. Bellaire Corp.*, 966 F.2d 1037 (6th Cir.1992); and *Rush v. United Technologies*, 930 F.2d 453 (6th Cir.1991); where this court set forth the elements of a § 510 claim in the context of cases in which each plaintiff in fact claimed that he was discharged to prevent him from becoming eligible for certain plan benefits. Accordingly, this court held that intent to interfere with the attainment of a benefit was, in those cases, an element of the plaintiff's claim. However, in neither *Humphreys* nor *Rush* did the court speak to cases other than those in which the employer's adverse action was taken to prevent the attainment of plan benefits. The plain language of the statute creates a cause of action based on an employer's retaliation for an employee's exercise of a right to which she is entitled, not just under a benefit plan, but under ERISA itself. *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir.1992); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 881 (9th Cir.1989), *cert. denied*, 498 U.S. 814, 111 S.Ct. 53, 112 L.Ed.2d 28 (1990). Simply put, intent to interfere with the attainment of benefits under a plan is not an element of a retaliation claim such as that made by Schwartz.

Gregori also challenges the district court's factual finding that Schwartz was discharged because she filed suit, contending that he rebutted Schwartz's prima facie case by proving that her discharge was motivated by legitimate, work-related reasons. We review the court's finding for clear error and find none. The district court was entitled to disbelieve Gregori's stated reasons for the

discharge, particularly in light of the facts that: (1) Gregori threatened to fire Schwartz if she filed suit; (2) the reasons given to Schwartz at the time of her discharge were proven to be untrue; and (3) the reasons advanced at trial differed from those given to Schwartz at the time of her discharge. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, ___, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."). In sum, we are presented with no basis on which to disturb the finding of liability for retaliatory discharge.

We turn, then, to the relief available to a person who has been discharged in retaliation for exercising a right protected by ERISA. This court previously has approved back pay awards for violations of ERISA § 510,[3] a fact that ordinarily would be dispositive of whether that particular remedy is available. However, Gregori challenges the availability of back pay and front pay on the authority of an intervening Supreme Court decision, requiring that we address the issue in this light.

In *Mertens v. Hewitt Associates*, ___ U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), the Court held that a nonfiduciary who knowingly participates in a fiduciary's breach of a duty imposed by ERISA is not liable for the resulting losses suffered by the employee benefit plan.

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[3] *Fleming v. Ayers & Assoc.*, 948 F.2d 993 (6th Cir.1991); *Browning v. Gutchess*, No. 87-3420, 1988 WL 28798 (6th Cir. Apr. 5, 1988).

The plaintiffs in *Mertens* brought suit under ERISA § 502(a)(3), which, as noted, permits plan participants to file a civil action for "appropriate equitable relief." Categorizing the relief sought by the plaintiffs as compensatory damages, "the classic form of *legal* relief," the Court held that such damages were precluded by § 502(a)(3). *Id.* at ___, 113 S.Ct. at 2068 (emphasis in original; citations omitted).

> The term "equitable relief" can assuredly mean . . . whatever relief a court of equity is empowered to provide in the particular case at issue. But . . . "equitable relief" can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).

*Id.* at ___-___, 113 S.Ct. at 2068-69 (emphasis in original). The question in light of *Mertens*, then, is whether back pay and front pay are equitable or legal remedies.

The parties draw no distinction between front pay and back pay in advancing their competing positions. We assess each remedy distinctly, focusing first on back pay. In *Chauffeurs Local 391 v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), the Court held that employees who seek relief in the form of backpay for their union's alleged breach of the duty of fair representation are entitled to a jury trial under the Seventh Amendment for the reason that they seek legal damages. The Court focused on the nature of the remedy sought in a fair representation case, money damages, " 'the traditional form of relief offered in the courts of law.' " *Id.* at

570, 110 S.Ct. at 1347 (citation omitted). While emphasizing that it had never held that all awards of monetary relief are necessarily legal in nature, the Court concluded that the relief sought from the union possessed no attributes justifying departure from the general rule that money damages constitute legal relief.

The Court's discussion of the attributes which justify the characterization of a money award as equitable is dispositive here. The Court stated that damages can be characterized as equitable where they are restitutionary, but rejected the proposition that the relief sought by the employees before it met this test. "The backpay . . . is not money wrongfully held by the Union, but wages and benefits they would have received from [their employer] had the Union processed the employees' grievances properly. Such relief is not restitutionary." *Id.* at 570-71, 110 S.Ct. at 1348. In contrast, the Court distinguished *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), where it had held that district courts have the equitable power, incidental to their injunctive powers to restrain violations of the Fair Labor Standards Act, to award lost wages to compensate employees wrongfully discharged in retaliation for asserting their rights under the FLSA. Significantly, *Terry* characterized the back pay at issue in *Mitchell* as *restitutionary*, and stated as well that relief incidental or intertwined with injunctive relief may be considered to be equitable.[4] *Terry*, 494 U.S. at 571, 110 S.Ct. at 1348.

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[4] Under *Mertens*, we cannot characterize relief as equitable solely because a court sitting in equity has the power to award it. "[L]imiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law

Like in *Mitchell*, the back pay at issue in this case was awarded against the employer rather than a third party, and thus operates to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation. While restitution generally is awarded to prevent unjust enrichment to the defendant, this is not required in every case. Restatement of Restitution § 1 cmt. e (1936). Nor is it necessary that restitution be made in kind, for a court may restore the plaintiff to the position he formerly occupied "either by the return of something which he formerly had or by the receipt of its equivalent in money."[5] 66 Am.Jur.2d *Restitution and Implied Contracts* § 1 at 942 (1973). While *Terry* did not expound on its reasons for characterizing as restitutionary the award of back pay against an employer for retaliatory discharge, these principles fully support its conclusion. As recognized by *Mertens*, restitution is a remedy typically available in equity, and falls within § 502(a)(3)'s category of "appropriate equitable relief." In

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court of equity could provide in such a case' would limit the relief *not at all*. We will not read the statute to render the modifier superfluous." *Mertens*, ___ U.S. at ___, 113 S.Ct. at 2069 (emphasis in original; footnote and citations omitted). Thus, if *Terry* had characterized the back pay approved in *Mitchell* as equitable simply because it was within the power of a court sitting in equity to award, *Mertens* would preclude a determination that back pay is equitable in nature and available under § 502(a)(3). However, *Terry* characterized the back pay in *Mitchell* as restitutionary, a remedy expressly recognized by *Mertens* as equitable.

[5] *Contra Waldrop v. Southern Co. Serv., Inc.*, 24 F.3d 152 (11th Cir.1994) (categorizing back pay as legal remedy under § 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a), and rejecting argument that back pay is restitutionary in nature).

light of *Mitchell*, *Terry*, and, ultimately, *Mertens*, we conclude that the back pay awarded here constituted restitution, and therefore is an equitable remedy available under § 502(a)(3).

The question of front pay is more straightforward. In other contexts, this court has characterized front pay as an equitable remedy. *E.g.*, *Shore v. Federal Express Corp.*, 42 F.3d 373 (6th Cir.1994) (front pay under Title VII, 42 U.S.C. § 2000e-5(g), authorizing "equitable relief"); *Roush v. KFC Nat'l Management Co.*, 10 F.3d 392, 398 (6th Cir.1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994) (action under Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1), authorizing legal or equitable relief; front pay characterized as equitable). Front pay is awarded only when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible. Like the remedy of reinstatement, the availability of front pay is committed to the discretion of the trial court, and review of its decision is for abuse of discretion. *Shore*, 42 F.3d at 377-78; *Roush*, 10 F.3d at 398. We are presented with no basis or reason for departing from this court's historical assessment of the nature of front pay, and conclude that it is an equitable remedy and consequently available under ERISA § 502(a)(3).

The district court awarded front pay based on the difference between Schwartz's current income and that which she would have received if her employment with Gregori had continued. The period of time encompassed by the award was eight and one-half years, terminating with Gregori's sixty-fifth birthday. Schwartz's total entitlement was then reduced by half to account for the

"obvious uncertainties of the future." Gregori does not challenge the court's calculations.

In determining the amount of front pay, a district court is to consider a number of factors, including the employee's work life expectancy. *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1160 (6th Cir.1985). The fact that an employee is an at-will employee, like Schwartz, alone would not justify a refusal of front pay, but can be taken into account in fashioning an appropriate remedy. *See Reneau v. Wayne Griffin & Sons, Inc.*, 945 F.2d 869, 871 (5th Cir.1991); *Andover Newton Theological Sch., Inc. v. Continental Casualty Co.*, 930 F.2d 89, 94 (1st Cir.1991). Here, the court effectively ordered front pay for a period of four years. This period is not challenged on appeal, and appears reasonable in light of the fact that the parties had worked together for seventeen years, thirteen as employer/employee.

We therefore **AFFIRM** the judgment against Gregori and Gregori, Inc., for retaliatory discharge and the award of back pay and front pay.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| DIANE SCHWARTZ<br>Plaintiff, | ) | Case No.<br>4:88 CV 4136 |
| vs. | ) | ORDER |
| JOSEPH GREGORI, et al.,<br>Defendant. | ) | (Filed<br>July 31, 1993) |

Battisti, J.

Plaintiff, Diane A. Schwartz, brought this action pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et sec.*, against defendant Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc., John J. Kuczek, and Kuczek & Associates, Inc. Plaintiff alleges that the defendants breached their fiduciary duties and wrongfully terminated her because she attempted to enforce her rights as a participant in an employee benefit plan. Plaintiff seeks an accounting of all assets lost as a result of the breach, restitution to the Plan of all losses resulting from the breach, redistribution of assets from the Plan after restitution is made, back pay and benefits, front pay, reinstatement, damages for emotional distress, attorney fees and costs.

This matter came before the Court for trial on May 6, 1992 through May 11, 1992. For the following reasons, the Court concludes that the defendants violated Plaintiff's rights under ERISA and that she is entitled to remedies pursuant to this Court's equitable jurisdiction. Based upon the evidence and arguments presented at trial, together with such evidence already of record in this

case, the Court makes the following finding of fact and conclusions of law:

## FINDINGS OF FACT

1. Defendant Gregory S. Gregori, M.D. ("Dr. Gregori") is a physician who resides and conducts his medical practice within the jurisdiction of this court.

2. Defendant Joseph S. Gregori, M.D., Inc. ("Gregori, Inc.") is an Ohio corporation organized to facilitate the medical practice of Dr. Gregori.

3. Defendant John J. Kuczek ("Kuczek") is an individual engaged in the business of selling insurance and financial planning services. Kuczek resides and conducts his business within the jurisdiction of this Court.

4. Defendant Kuczek and Associates, Inc. ("Kuczek & Associates") is an Ohio corporation organized to facilitate the operation of Kuczek's insurance business.

5. Plaintiff Diane A. Schwartz ("Plaintiff") was employed by Gregori, Inc. as a radiological technician, office manager and medical assistant for thirteen years. Prior to 1975, Plaintiff was employed as an X-ray technician in the doctor's office where Dr. Gregori was employed.

6. In 1975, Dr. Gregori established the Joseph S. Gregori, M.D., Inc. Employers' Pension Plan and Trust Agreement ("the "Plan") at the suggestion of Kuczek, his friend and adviser.

7. Participants in the Plan included Dr. Gregori, Plaintiff and Ann Marie Lamb ("Lamb").

8. Kuczek and Kuczek & Associates assisted and advised, Dr. Gregori in setting up the Plan (Tr. 142, Tr. II 27, 58). They were also involved in the subsequent modification of the Plan. (Tr. 35).

9. According to Plan documents, Dr. Gregori served as Trustee and Gregori, Inc. served as administrator of the Plan.

10. Investment of Plan assets were handled by Dr.Gregori as Trustee. (Tr. 28). Dr. Gregori relied on Kuczek's investment advice and expertise in making investment decisions. (Tr. II 28).

11. Dr. Gregori had no investment experience. (Tr. II 28). Dr. Gregori made investment decisions based on Kuczek's expertise and experience. (Tr. II 28).

12. Kuczek and Kuczek & Associates has complete access to all plan records, including the accounts of individual Plan participants. (Tr. 71-73, 77-78, 156).

13. Kuczek and Kuczek & Associates were compensated for the investment advice that they provided to the Plan. Kuczek & Associates earned a commission on the sale of life insurance policies which were purchased on Plan participants through Kuczek & Associates. (Tr. 51, Tr. II 58-59) They also received a commission on investments they made for the Plan. Tr. 109-11, 114)

14. In 1983, Dr. Gregori and Kuczek discussed at length investing Plan assets in a commodities fund under the direction of David Meek ("Meek"). (Tr. II 28). Meek was commodity fund advisor and investor. (Tr. 93).

15. In 1983 Dr. Gregori had no knowledge of how the commodities market worked. (Tr. 149).

16. Dr. Gregori and Kuczek discussed the pros and cons of the investment. Kuczek told Gregori that he had investigated the fund and had made the decision to invest. (Tr. II 29).

17. Kuczek's investigation consisted of the following: discussing the subject with other consulting professionals who had already invested in the Meek funds, reviewing articles concerning commodities funds in general, reviewing articles concerning Meek, and reviewing a placement memorandum outlining the nature of the funds.

18. Kuczek decided to go forward with a limited investment as a test. Kuczek invested personal funds and recommended to four clients, including Gregori, Inc., that they invest relatively small amounts as well. (Tr. 94).

19. In September 1983, Dr. Gregori invested $50,000 of Plan assets on the commodities funds managed by Meek. (Tr. 95).

20. Dr. Gregori delegated complete authority to Kuczek for the investigation and placement of Plan assets with the commodities funds controlled by Meek. (Tr. 166, 169). Dr. Gregori failed to read the disclosure documents concerning these investments even though he represented that he had done so. (Tr. V 36).

21. Plaintiff first learned that plan assets were to be invested in commodities funds in September 1983. Plaintiff expressed concern that such an investment carried a high risk. Dr. Gregori advised her that only money from his pension fund was being invested. (Tr. 231, Tr. II 60).

22. Dr. Gregori relied on Kuczek and Kuczek & Associates to monitor the progress of this investment. Since the commodities funds in question were privately offered pools, there was no publicly published records as to the progress of these investments (Tr. 99). Kuczek and Kuczek & Associates relied on unaudited reports issued by the commodities funds to monitor the progress of this investment. (Tr. 98, 99).

23. After approximately two months, Kuczek concluded that the investment program was viable and safe for investment of his own and his clients' funds.

24. In November 1983, Kuczek and two associates traveled to Florida to conduct a due diligence. (Tr. 100). Kuczek-wanted to interview Meek, study his operation and otherwise satisfy himself that a more significant study could be made in Meek managed funds. (Tr. 100).

25. Kuczek and his associates questioned Meek and his employees regarding their business practices, investment strategies, and past performance. Kuczek learned that Meek's company had only been in business for eight to nine months. (Tr. 100).

26. Upon examination of Meek's offices, Kuczek found a fully staffed, equipped and furnished office. (Tr. V 95-98).

27. Since Meek's company had been in business for less than one year, Kuczek asked to review Meek's personal tax returns for the prior two years. (Tr. 100-01) . Kuczek did not ask to see any profit or loss statements or any other interim financial statements for the company. (Tr. 100).

28. Kuczek did not contact any of Meek's prior employers to verify his experience and background.

29. Based on his investigation, initial investments, on-site investigation and interviews, Kuczek was satisfied with what he saw.

30. Kuczek advised Meek that he was prepared to recommend to various clients that they invest in Meek managed commodities funds but insisted upon some additional safeguards. First, separate funds would have to be created to be managed by different account managers. Investments made by Kuczek's clients would then be equally divided among several of the funds which would each be independently managed by professionals retained by Meek. In addition, Meek would provide to Kuczek weekly statements of net asset values, rather than the usual monthly statement for each fund in order that Kuczek could more swiftly advise his clients regarding withdrawal from the funds in the event that the investment performance became poor.

31. Kuczek advised Dr. Gregori of what he had learned about these investments and recommended that a significant portion of Plan assets be invested in three of the new funds.

32. An additional $108,500 in Plan assets was invested in commodities funds under the direction of Meek. At the time these funds were invested, they represented 45.6% of the total plan assets.

33. Dr. Gregori relied on Kuczek and Kuczek & Associates to monitor the progress of these investments.

34. Reports were issued by Meek on a weekly basis indicating that the funds were performing as expected.

35. In 1984, at Kuczek's suggestion, Plaintiff invested $6,200 of her own money in the commodities deal. (Tr. 238). Kuczek told her that he would guarantee her original investment (Tr. 238, 292).

36. Neither Kuczek nor Kuczek & Associates were licensed to deal in the commodities markets, nor had they had any prior experience with investments of this nature prior to placement of Plan assets with the commodities funds controlled by Meek. (Tr. 31, 98).

37. Prior to the investment of Plan funds in the commodities funds controlled by Meek, the Plan had generally limited its investments to publicly traded mutual or money market funds and loans to local individuals which were secured by real estate mortgages.

38. In June 1984, Dr. Gregori received a letter indicating that federal regulatory authorities had sued Meek because of certain irregularities in the operation of his commodities funds. Dr. Gregori referred the letter to Kuczek without reading it. Neither Kuczek nor Kuczek & Associates made any effort to seek an independent investigation and evaluation of this litigation, nor did they attempt to withdraw the plan funds which had been invested.

39. In February 1985, Kuczek received a notice that the Commodities Futures Trading Commission ("CFTC") was investigating Meek. (Tr. 120). Kuczek responded by contacting Meek. (Tr. 120-21). After talking to Meek, Kuczek was satisfied that the CFTC's investigation was a

routine audit and of no concern. (Tr. 122). Kuczek did not contact the CFTC at this time. Kuczek made no attempt to withdraw the invested funds at this time. (Tr. 122).

40. In November 1985, Kuczek sent a memo to his clients advising them that the CFTC had elected to freeze all of the Meek commodities funds. (Tr. 126-27, 164).

41. In June 1987, Kuczek received a letter from Carol Ausflug ("Ausflug") indicating that there had been a loss in the Plans assets. (Tr. 37-38).

42. Ausflug was the owner of QPC, the company employed by the Plan to provide annual administrative work. (Tr. 37, 53-54).

43. The July statement for the Plan indicated that there had been a loss in the pension funds. Plaintiff learned that distributions to the participants of the Plan were reduced by 37.2%.

44. Plaintiff and Lamb confronted Dr. Gregori about the reduction in the Plan's assets. Until this time, Dr. Gregori was not aware that funds from Plaintiff's pension had been invested in the commodities market.

45. Dr. Gregori scheduled a meeting of participants of the Plan so Kuczek could explain the loss.

46. Kuczek learned that the federal investigation had concluded that Meek embezzled substantially all of the money invested with the commodities funds.

47. The total loss to the Plan was $288,991.09. Plaintiff's share of this loss was $19,728.15. (Stipulation filed May 6, 1992).

48. In August 1987, Dr. Gregori, Plaintiff, Lamb and Ausflug met to discuss the problems with the Plan. (Tr. 239-40). Kuczek informed them that the IRS determined that the lost assets would not be returned to the Plan for distribution at termination.

49. Kuczek offered to make restitution for losses to the Plan. (Tr. 137, 184-85, Tr. II 34). However, Dr. Gregori refused Kuczek's offer because of their friendship. (Tr. 137, 184-85, Tr. II 34). Kuczek did reimburse Plaintiff the $6,200 that she personally invested by repurchasing her shares. (Tr. 239).

50. Dr. Gregori offered to repay the losses suffered by Plaintiff and Lamb with salary bonuses over a three-year period. (Tr. 241, Tr. II 49). The proposed bonuses were not eligible to be rolled over as qualified lump-sum distributions and would be taxable as ordinary income. (Tr. 242). Lamb accepted this proposal. Plaintiff rejected the proposal and demanded a lump-sum payment of $70,389.74.

51. The Plan was terminated on March 31, 1988. Plaintiff received a distribution of $54,381.22. (Tr. 189).

52. As a result of her efforts to enforce her rights as a participant in the Plan, Dr. Gregori reduced Plaintiff's work hours and salary. (Tr. 244-45).

53. After Plaintiff retained legal counsel, Dr. Gregori advised her that further efforts to enforce her rights would result in the termination of her employment. (Tr. 249).

54. On November 10, 1988, Plaintiff filed this action for breach of fiduciary duties against Dr. Gregori and Gregori, Inc.

55. In mid-November Dr. Gregori posted an advertisement in a local hospital looking for an x-ray technician to replace Plaintiff. (Tr. 194).

56. Dr. Gregori told Plaintiff that the applicant would be replacing her while she was on a short vacation. (Tr. 196). He instructed Plaintiff to train the applicant in the operation of the x-ray machine. Plaintiff trained her for two days. (Tr. 196).

57. On December 9, 1988, Dr. Gregori informed Plaintiff by letter that her employment with Gregori, Inc. was terminated. (Exhibit 1). Dr. Gregori stated the following reasons for terminating Plaintiff: (1) reduction in hours/scaling back his practice, (2) implementing computerization, (3) his wife's increasing role in the operation of the office. (Plaintiff's Exhibit 16). (Tr. 200-01).

58. At trial, Dr. Gregori testified that he terminated Plaintiff for incompetence, failing to perform her duties, causing a disturbance in the office, failing to communicate and failure to show initiative. (Tr. II 48).

59. Through discovery, Plaintiff obtained a copy of a letter sent by Dr. Gregori on November 11, 1988 to his attorney seeking assistance in preparing a termination letter. The letter indicates that Dr. Gregori had discussed Plaintiff's termination with Kuczek. (Exhibit 13). Dr. Gregori admitted discussing terminating Plaintiff with Kuczek. (Tr. 191).

60. Dr. Gregori's stated reasons for terminating Plaintiff were pretextual.

61. Dr. Gregori has continued his practice of medicine at approximately the same level and with the same number of employees since the date of Plaintiff's termination. Substantially all of the duties performed by Plaintiff are now distributed among the current employees. (Tr. 203-10).

62. As of December 1991, Dr. Gregori had yet to computerize his office. (Tr. 202).

63. Dr. Gregori's wife worked in his office for a total of four months beginning in November 1988. (Tr. 201, Tr. II 52).

64. Although Dr. Gregori represented that Gregori, Inc. will cease to exist as of Spring 1983, it appears that Dr. Gregori will continue to practice medicine in the foreseeable future. (Tr. II at 54-56). Based upon his representations to Plaintiff, priori to the dispute over the pension funds, Plaintiff would have continued in her employment. (Tr. 235).

65. Plaintiff has been unable to obtain a written reference from Dr. Gregori. (Tr. 254, 301). The lack of a reference from her employer of thirteen years has inhibited her ability to obtain similar employment.

66. Since her termination, Plaintiff has been employed as an x-ray technician at a local hospital. (Tr. 255).

67. Plaintiff has incurred substantial attorneys fees and litigation expenses in the prosecution of this action.

68. Any Conclusion of Law deemed to be a Finding of Fact is incorporated herein.

## CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a conclusion of law is incorporated herein.

2. Jurisdiction is conferred upon this Court by reason of Title 29 U.S.C. § 1001 et seq. known as the Employee Retirement Income Security Act of 1974 ("ERISA") and more specifically Title 29 U.S.C. § 1132(e).

3. At all relevant times, Gregori, Inc. was an employer as that term is defined in 19 U.S.C. § 1002(5)

4. At all relevant times, Plaintiff was an employee of Gregori, Inc. as that term is defined in 29 U.S.C. § 1002(6).

5. At all relevant times, Plaintiff was a participant in the Plan as that term is defined in 29 U.S.C. § 1002(7).

6. Under ERISA, the term "fiduciary" is defined as follows:

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority of control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). Congress intended the term to be broadly construed. *Donovan v. Mercer,* 747 F.2d 304, 308 (5th Cir. 1984). "[T]he definition includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A/M/ 4639, 5038, 5103. "Thus, 'fiduciary' should be defined not only by reference to particular titles, such as 'trustee' but also by considering the authority which a particular person has or exercises over an employee benefit plan." *Brock v. Hendershott,* 840 F.2d 339, 342 (6th Cir. 1988) (quoting *Donovan,* 747 F.2d at 308).

7. Dr. Gregori and Gregori, Inc. were fiduciaries of the Plan under ERISA. 29 U.S.C. § 1002(21)(A)and § 1105(c)(1)(B).

8. Kuczek and Kuczek & Associates were also fiduciaries, of the Plan as that term is defined under ERISA. They had the power to manage, acquire or dispose of any assets of the Plan. They were involved in the establishment and subsequent modification of the Plan and they rendered investment advice to the Plan.

9. An "entity (or individual] need not have absolute discretion with respect to a benefit plan in order to be considered a fiduciary, rather, fiduciary status exists with respect to any, activity enumerated in the statute over which the entity (or individual) exercises discretion or control." *Blatt v. Marshall and Lassman,* 812 F.2d 810, 812 (2d Cir. 1987) (citations omitted).

10. Kuczek and Kuczek & Associates were compensated for their investment advice. The Plan held life insurance on its participants. The policies were purchased

from Kuczek & Associates and Kuczek and his corporation received a commission from the sale. Kuczek & Associates also received a fee for placing the funds in the commodities market. Therefore, Kuczek and Kuczek & Associates are fiduciaries as that term is defined under ERISA.

11. Under ERISA, a fiduciary must

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. § 1104(1)(B).

12. Dr. Gregori has breached his duties as a fiduciary of the Plan.

13. By refusing Kuczek's offer to reimburse the Plan because of his personal relationship with Kuczek, Dr. Gregori failed to discharge his duties with respect to the Plan *solely* in the interest of the Plan's participants.

14. By executing Plan documents without reading them or understanding their significance, Dr. Gregori failed to discharge his duties with the required care, skill, prudence and diligence.

15. Dr. Gregori delegated complete and total authority for the investment of Plan assets and the monitoring of those investments to Kuczek and Kuczek & Associates while a fiduciary may delegate his fiduciary

duties to others, he remains liable for the breach of fiduciary responsibilities by another. 29 U.S.C. § 1105(a) and (c). Therefore, Dr. Gregori is liable for any and all breaches of fiduciary responsibilities by Kuczek and/or Kuczek & Associates.

16. Kuczek and Kuczek & Associates breached their duties as fiduciaries of the Plan.

17. By failing to adequately investigate Meek and his company, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

18. By failing to adequately investigate the actions taken by the CFTC against Meek, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

19. By investing Plan Assets in an area in which they had no prior experience, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

20. By investing Plan assets in a private commodity fund pool which offered no regulatory protections, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

21. By failing to adequately investigate the litigation which was initiated against Meek in June 1984, Kuczek and Kuczek & Associates failed to discharge their duties with the required care, skill and diligence.

22. By failing to attempt to withdraw Plan assets from the Meek-controlled funds after learning of the CFTC's involvement, Kuczek and Kuczek & Associates

failed to discharge their duties with the required care, skill and diligence.

23. As a direct and proximate result of Dr. Gregori's Kuczek's and Kuczek & Associates' breach of their fiduciary duties, the Plan suffered a loss of $288,991.09. Plaintiffs' share of their loss totaled $19,728.15.

24. Under ERISA:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan.

29 U.S.C. § 1140.

25. Dr. Gregori unlawfully discharged the Plaintiff.

26. Dr. Gregori's stated reasons for terminating the Plaintiff were pretextual. The true reason for Plaintiff's termination was that he was upset that she filed this action to enforce her rights as a participant in the Plan.

## REMEDY

1. Plaintiff requests an accounting of all Plan assets lost as a result of the Defendants' breach of their fiduciary duties. This request is denied since the parties have stipulated to the amount of the loss.

2. Under ERISA a participant is entitled to obtain other appropriate remedy that will put her in the position she would have been in if the fiduciary had not committed the breach. *Warren v. Society National Bank*, 903 F.2d 975 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct.

2256 (1991); 29 U.S.C. § 1322(a)(3)(B). This remedy includes monetary damages. *Id.* Therefore, Defendants are jointly and severally liable for the $19,728.15 loss suffered by Plaintiff as a result of Defendants' breach of their fiduciary duties.

3. Plaintiff may recover prejudgment interest on the $19,728.15 loss. *Drennan v. General Motors Corp.*, 977 F.2d 246 (6th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2416 (1992) (holding that the award of prejudgment interest in an ERISA action is within the discretion of the district court).

4. Prejudgment interest is awarded in the instant case in order to put the Plaintiff in the position she would have occupied but for the Defendants' breach. *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984).

5. To determine prejudgment interest the court relies on 28 U.S.C. § 1961. *Laird v. Metropolitan Life Insurance Co.*, No. C88-2699 (N.D. Ohio June 18, 1993); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1219 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981); *Kann v. Keystone Resources Inc.*, 575 F. Supp. 1084, 1096 (W.D. Pa. 1983). The rate of prejudgment interest in an ERISA case is a federal question, and 28 U.S.C. § 1961 is applicable as the most analogous federal statute. *Id.*

6. Pursuant to 28 U.S.C. § 1961(a), postjudgment interest is calculated:

> from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last

> auction of fifty-two week United States Treasury bills settled *immediately prior to the date of the judgment.*

28 U.S.C. § 1961(a) (emphasis added).

7. As directed by § 1961, the Court will calculate prejudgment interest based upon the interest rate paid on a fifty-two week United States Treasury bill. In this regard, however, the reference date for determining the appropriate rate to calculate prejudgment interest will be the date of loss instead of the date of judgment. *See Keystone*, 575 F. Supp. at 1096, where the court, in calculating prejudgment interest, used the rate immediately prior to the date that the plaintiff had first demanded his vested benefits.

8. The rate of prejudgment interest will be the Treasury bill interest rate immediately prior to the date of the Plaintiff's loss, June 30, 1987.

9. The Treasury Bill rate as of June 4, 1987, the date immediately prior to June 30, 1987, is 7 percent. At 7 percent compounded annually from the period of June 30, 1987 to July 31, 1993 the Defendants are jointly and severally liable to the Plaintiff for prejudgment interest in the amount of $10,077.

10. Plaintiff requests an award of attorney's fees and costs. Section 502(g)(1) of ERISA, 29 USC § 1132(g)(1) provides that "the court in its discretion *may* allow a reasonable attorney's fee and costs of action to either party." (emphasis added).

11. Factors to assist the court in deciding whether to award attorney's fees include: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Hummel v. SE Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980).

12. Plaintiff is awarded attorney's fees since the Defendants, in bad faith, clearly violated their fiduciary duties.

13. Title 29 U.S.C § 1132 is the applicable statute to enforce ERISA's unlawful discharge provision, 29 U.S.C. § 1140, which prohibits an employer from discharging an employee for exercising any right to which she is entitled under the provisions of an employee benefit plan. 29 U.S.C. § 1140.

14. Under § 1132 a civil action may be brought

> (3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan

29 U.S.C. § 1132(a)(3)(B).

15. At all relevant times, Plaintiff was a participant in the Plan as that term is defined in 29 U.S.C. § 1002(7).

16. Although the Sixth Circuit has not addressed the issue of awarding damages such as back pay, reinstatement to former position, front pay, and restitution of forfeited employees's benefit for violating § 1140, other district courts have allowed such awards pursuant to § 1132(a)(3)(B). *See Folz v. Marriot Corp.*, 594 F. Supp. 1007 (W.D. Mo. 1984); *Bittner v. Sadoff & Rudoy Ind.*, 490 F. Supp. 534 (E.D. Wis. 1980). In *Folz*, it was held that "[a] careful review of the pertinent statutory language and legislative history of ERISA, along with a comparison of ERISA to similar remedial statutes, [such as Title VII and ADEA], leads this Court to conclude that its equitable power under ERISA is not limited to mere reinstatement of pension plan benefits. Rather, . . . it has the equitable power under ERISA to put the plaintiff 'back into the position he enjoyed before the discharge'." *Folz*, 594 F. Supp. at 1016, citing *Bittner*, 490 F. Supp. at 536. This reasoning is adopted.

17. Plaintiff is awarded back pay in the amount of $57,765 against Dr. Gregori and Gregori, Inc. This amount is the difference between the Plaintiff's actual salary and the salary Plaintiff would have earned from Dr. Gregori. The calculation covers the period from the date of discharge to the date of judgment. (See Plaintiff's Exhibit 32).

18. Plaintiff seeks an award of front pay in lieu of reinstatement. In this case, front pay may be awarded to the Plaintiff since reinstatement is unreasonable due to the extreme hostility existing between the parties. *Folz*, 594 F. Supp. at 1018.

19. However, " '[F]ront pay' does not appear to lend itself to a per se rule. . . . [It] must be governed by the sound discretion of the trial court and may not be appropriate in all cases." *Davis v. Combustion Engineering*, 742 F.2d 916, 922-23 (6th Cir. 1984). The trial court's discretion includes determining the cut-off date for the award of front pay. *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1160 (6th Cir. 1985). See, *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3rd Cir. 1984) (holding that the district court did not abuse its discretion by limiting front pay to a period of four months); *Davis*, 742 F.2d at 923 (stating that the award of front pay to a discriminatorily discharged 41 year old employee until he qualifies for a pension plan might be unwarranted, however, the failure to make such an award to a 63 year old might be an abuse of discretion).

20. In the instant case, the total amount of front pay that might be awarded the Plaintiff was arrived at by calculating the difference between Plaintiff's current annual income from the date of judgment – adjusted to reflect the fact that the Plaintiff is currently working one more day a week than she did when employed by Dr. Gregori – and the income Plaintiff would have made if she were still employed by Dr. Gregori through the year 2001 when he reaches age 65, the normal retirement age. The difference in annual income was discounted to its present value and resulted in an amount of $84,887. (See Plaintiff's Exhibit 32).

21. However, due to the obvious uncertainties of the future it seems fair to reduce the above figure by fifty percent. Thus, the Plaintiff is awarded front pay in the amount of $42,443 against Dr. Gregori and Gregori Inc.

22. Plaintiff's claim for emotional distress damages is denied. They are unavailable under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986).

23. Based on the applicable law and the totality of the circumstances the Court finds that the Plaintiff has been adequately compensated and denies any and all other relief requested by Plaintiff in her pleadings or during the trial.

Accordingly, as a matter of law, Plaintiff is entitled to judgment (1) on her breach of fiduciary duty claim against Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc., John J. Kuczek, and Kuczek & Associates, Inc.; and, (2) on her wrongful discharge claim against Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc. she is awarded damages as follows:

1. Restitution for the loss she suffered against Defendants, jointly and severally, in the amount of $19,728.15.

2. Prejudgment interest on the loss against Defendants, jointly and severally in the amount of $10,077.

3. Back pay against Defendant Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc. in the amount of $59,764.

4. Front pay against Defendant Joseph S. Gregori, M.D., Joseph S. Gregori, M.D., Inc. in the amount of $42,443.

5. Plaintiff is awarded attorney's fees. The amount will be specified, seasonably, in an amended order after receiving an affidavit from Plaintiff's counsel setting

forth the applicable hours and rates. The affidavit shall be submitted within 7 days of the entry of this Order.

IT IS SO ORDERED.

/s/ Frank J. Battisti
Frank J. Battisti
United States
District Judge

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| DIANE SCHWARTZ, | ) | Case No. |
| Plaintiff, | ) | 4:88 CV 4136 |
| | ) | |
| v. | ) | ORDER |
| JOSEPH GREGORI, et al. | ) | (Filed 93 NOV 12) |
| | ) | |
| Defendants. | ) | |
| BATTISTI, J. | ) | |

Following a trial in May of 1993, the Court found that the Defendants, in bad faith, had clearly violated their fiduciary duties to the Plaintiff. In an Order dated July 31, 1993 (the "July Order"), Plaintiff's counsel was directed to submit an Affidavit in support of attorney's fees in this action. Before the Court is the Affidavit and Supplemental Affidavit of Attorney Robert S. Hartford, Jr. and Defendant Gregori's Memorandum in Opposition to Plaintiff's Request For Attorney's Fees.

In the July Order, the Court inadvertently failed to grant "costs" as well as attorneys fees. Despite this omission, the Affidavits filed by the Plaintiff (and the response of the Defendant) provide sufficient information for the Court to make a fair determination of awardable costs. Of course the Court has discretion to award both fees *and* costs, *see* 29 U.S.C. § 1132(g)(1), and such an award is appropriate. At this time, the previous Order is amended to grant costs as well as attorneys fees, in accordance with the discussion below.

Attorneys Fees and Costs

Plaintiff's attorneys are entitled to an award of fees and costs in this case, but not to the contingency fee enhancement that they have requested. ERISA provides that in "any action under this subchapter . . . the court in its discretion may allow a reasonable attorney's fees and costs of action to either party." 29 U.S.C. § 1132(g)(1). In *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), the Sixth Circuit discussed at length the proper application of the ERISA fee shifting provision. Although the decision whether to award fees is discretionary, the court noted that five factors should generally be considered:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

*Id.* at 1301. These factors are referred to as the "*King-Eaves* factors."

The court in *Armistead* also indicated, however, that a district court should not feel bound by these factors. The court stated that:

> We believe the broad wording of the statute has the effect of repealing the American Rule in ERISA cases and permitting the federal courts to devise a common law of fee-shifting. In doing so, the courts may take into consideration any of

> the legitimate, relevant purposes for which fee-shifting has been permitted or proposed, including punishing bad faith litigants, providing the plaintiff with complete relief in appropriate cases, preventing the unjust enrichments of those who benefit from successful litigation, or removing deterrents to meritorious litigation by reducing the disparity between the resources available to the parties. The *King-Eaves* factors, which include many of the traditional reasons for awarding fees, are as good a place as any to begin the development of a common law of fee-shifting under ERISA, even if they do not turn out to be the final word on the subject.

*Id.* at 1303-4.

All of the factors mentioned by the Sixth Circuit in *Armistead* support the award of attorney's fees in this case. As detailed in the Findings of Fact and Conclusions of Law in the July Order, the Defendants breached their fiduciary duty to the Plaintiff and compounded their bad faith by unlawfully discharging her. Furthermore, the denial of fees will require the Plaintiff to use her benefits to pay her attorneys. This will unfairly force her to pay for Defendants' repeated misconduct. Finally, imposing fees and costs on the Defendants serves the other members of the ERISA plan because it may cause Defendants, as plan administrator, to act more equitably in evaluating future responsibilities.

One method for calculating reasonable attorney's fees is to determine the "lodestar." The Supreme Court recently remarked in *Burlington v. Dague*, ___ U.S. ___, 112 S. Ct. 2638, 2641 (June 24, 1992), that "the 'lodestar' figure has, as its name suggests, become the guiding light of our

fee-shifting jurisprudence." The lodestar is calculated by multiplying the reasonable hours expended on a case by the reasonable hourly rate of the attorneys involved. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Although Plaintiff's attorneys argue that the lodestar should be adjusted to reflect the risky nature of this case, the Supreme Court held in *Dague* – a case involving similar statutory language – that such "contingency fee enhancement" is not allowed. *Dague*, 112 S. Ct. at 2643-4.

Plaintiff's attorneys from the law firm of Nadler, Nadler & Burdman Co., LPA, ("NN&B") have submitted an itemized breakdown of the time spent by them on this case. The Plaintiff was represented by Attorney Robert C. Mostov until December of 1988. Since December of 1988, the following attorneys from NN&B have represented the Plaintiff: Attorney Robert S. Hartford Jr., Attorney Peter B. Grinstein, Attorney Jeffrey M. Grinstein, Attorney Timothy H. Reardon. Furthermore, William A. Myers, a law clerk at NN&B assisted with the representation of the Plaintiff. The Court has reviewed the itemized entries and is satisfied that they are reasonable considering the extensive discovery, legal briefing and trial preparation involved. Moreover, the Court has reviewed the qualifications of the above named attorneys and law clerk and finds that their stated rates are reasonable. Thus, multiplying each attorney's hours by their respective hourly rates results in a lodestar of $33,407.50.

However, the Defendant argues correctly that the fees spent pursuing the unsuccessful claims for emotional distress must be deducted from the total. Therefore, the Court finds that $154.00 should be deducted from the above total, leaving $33,253.50.

All that remains to be determined is the reasonableness of the "costs"[1] presented by Plaintiff's attorneys. The Defendant argues that the costs associated with expert witnesses should not be awarded in situations, such as this, where the statute does not specifically provide for such an award. The Supreme Court has endorsed this position. *See West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991). Therefore, the expense attributable to Dr. Raymond – $1,959.08[2] – must be excluded, leaving compensable costs of $3296.07. This amount does not seem unreasonable in light of the deposition and other expenses involved.

## Conclusion

Accordingly, Plaintiff's attorneys are awarded $33,253.50 in fees and $3296.07 in costs.

IT IS ORDERED.

/s/ Frank J. Battisti
United States District Judge

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[1] Although the Plaintiff lists certain expenses as "costs of action," except for the actual court filing fees, these amounts could quite readily be included in the "attorneys fees."

[2] The costs for the transcript of Dr. Raymond should not be excluded, as that document was marked and admitted as an Exhibit in the Plaintiff's case in chief.

## APPENDIX III

## STATUTES

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B – REGULATORY PROVISIONS
PART 5 – ADMINISTRATION AND ENFORCEMENT
COPR. (c) WEST 1993 No Claim to Orig. Govt. Works
Current through P.L. 103-81, approved 8-13-93

29 U.S.C. § 1132. Civil enforcement

(a) **Persons empowered to bring a civil action.** A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

(g) **Attorney's fees and costs; awards in actions involving delinquent contributions.**

(1) In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan –

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of –

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or if none, the rate prescribed under section 6621 of Title 26.

* * *

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UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18 – EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I – PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B – REGULATORY PROVISIONS
PART 5 – ADMINISTRATION AND ENFORCEMENT
COPR. (c) WEST 1993 No Claim to Orig. Govt. Works
Current through P.L. 103-81, approved 8-13-93

29 U.S.C. § 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. s 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. it shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has

given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

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Supreme Court, U.S.
FILED
APR 5 1999
OFFICE OF THE CLERK

No. 98-1414

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

DIANE ALICE SCHWARTZ,

*Petitioner,*

*vs.*

JOSEPH S. GREGORI, M.D. and
JOSEPH S. GREGORI, M.D., INC., Individually and as
Trustee and Administrator of Pension Plan and Trust,

*Respondents.*

*On Petition for Writ of Certiorari*
*to the United States Court of Appeals*
*for the Sixth Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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1899

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Joseph S. Gregori, M.D., Inc., is a professional corporation and has no parent companies and no nonwholly owned subsidiaries.

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## STATEMENT OF THE CASE

This action was initially filed by Diane A. Schwartz (hereinafter "Schwartz"), in the United States District Court for the Northern District of Ohio on November 10, 1988, seeking damages for alleged violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (hereinafter "ERISA").

This matter was tried to Judge Frank J. Battisti from May 6, 1992 through May 11, 1992 in Youngstown, Ohio. The District Court entered Judgment in this case on July 31, 1993, as follows:

> Against all Defendants jointly and severally on the breach of fiduciary duty claim for the loss suffered by the Plan in the amount of $19,728.15, for prejudgment interest on that loss in the amount of $10,077.00, and attorneys' fees, and against Gregori on the 29 U.S.C. § 1140 wrongful discharge claim for back pay in the amount of $59,764.00 and front pay in the amount of $42,443.00.

Joseph S. Gregori, M.D. and Joseph S. Gregori, M.D., Inc. (hereinafter "Gregori") appealed from the judgment of the District Court, and Schwartz filed a cross-appeal. On January 31, 1995, this Court of Appeals affirmed the judgment of the District Court. On February 14, 1995, Gregori filed a Petition for Rehearing and Suggestion for Rehearing En Banc pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rule 14 of the Rules of Appellate Procedure for the Sixth Circuit Court of Appeals. That Motion was denied on March 17, 1995.

Gregori sought further review by this Court by filing a Petition for Writ of Certiorari. Schwartz filed a Memorandum in Opposition to Gregori's Petition and Gregori then filed a Reply Brief. The United States Supreme Court denied Gregori's Petition for Certiorari on October 2, 1995.

Though the District Court's initial July 31, 1993 Order awarded Schwartz attorneys' fees for the District Court portion of these proceedings, the Order did not fix an amount. On November 12, 1993, the District Court entered an Order awarding Schwartz attorneys' fees in the in the amount of $33,253.50 and costs in the amount of $3,296.07 in connection with the Court's earlier Order.

All of the damages referenced above and arising out of the District Court's July 31, 1993, and November 12, 1993, Orders have been paid in full. This appeal relates solely to a number of additional attorneys' fee petitions filed by Schwartz for attorneys' fees incurred in connection with Gregori's appeal to the Sixth Circuit and Petition for Writ of Certiorari.

The first portion of Schwartz's additional request was for $43,365.05 in attorneys fees and $2,597.80 in costs related to the work done by the law firm of Nadler, Nadler & Burdman Co., L.P.A. with respect to the appeal and cross-appeal to the Sixth Circuit Court of Appeals.

The second portion of Schwartz's additional request was for $38,587.50 in attorney's fees and $1,170 in costs related to the work done by Plaintiff's husband, Attorney Richard Schwartz, in connection with Schwartz's response to Gregori's Petition for Writ of Certiorari to the United States Supreme Court.

Both Nadler, Nadler & Burdman Co., L.P.A. and Richard Schwartz filed supplemental attorneys' fees petitions seeking fees associated with their attempts to collect the attorneys' fees related to the appellate aspects of this case.

A hearing on the pending attorneys' fee petitions was held before Magistrate Judge James D. Thomas on September 25, 1996. Magistrate Judge Thomas filed a Report and Recommendation on July 23, 1997, suggesting that the attorneys' fee petitions be granted in part and denied in part. The Magistrate's Decision suggested awarding attorneys' fees as follows: (1) $47,308.05 in fees and $3,862.34 in costs to the law firm of Nadler, Nadler & Burdman Co., L.P.A. for the work before the Sixth Circuit; and (2) $10,500 in attorney's fees and $1,240 in costs to Richard Schwartz for the work done before the United States Supreme Court.

Both Schwartz and Gregori filed Objections to Magistrate Judge Thomas's Report and Recommendation. On September 26, 1997, Judge Peter C. Economus granted Gregori's Objections, rejected Magistrate Judge Thomas's Report and Recommendation, and denied the pending attorneys' fee petitions.

Schwartz filed an Appeal with the Sixth Circuit Court of Appeals relative the District Court's denial of her requests for additional attorneys' fees. The Sixth Circuit reviewed the District Court's denial of appellate attorneys' fees for an abuse of discretion.

The principle issue before the Sixth Circuit was whether the five-part test adopted by the Circuit for analyzing requests for attorneys' fees in ERISA litigation should be applied to the defendants' underlying conduct which gave rise to the

litigation or to the merits of the appeal. The Sixth Circuit concurred with the District Court and decided that the analysis is to be applied to the merits of the appeal.

The Sixth Circuit concluded that although Gregori's arguments on appeal were ultimately rejected, they raised significant issues of first impression not only in the Sixth Circuit, but with respect to any federal Court of Appeals. Gregori's appellate arguments were based on a good faith and rational interpretation of existing federal law.

On November 20, 1998, the Sixth Circuit affirmed the District Court's denial of Schwartz's requests for additional attorneys' fees. The Sixth Circuit denied a Motion for Rehearing and Suggestion for Rehearing En Banc on December 23, 1998. Schwartz timely filed a Petition for Writ of Certiorari with this Court on March 4, 1999.

## REASONS FOR DENYING THE WRIT

### I.

### THE STANDARD APPLIED BY THE SIXTH CIRCUIT IN ANALYZING SCHWARTZ'S REQUESTS FOR APPELLATE ATTORNEYS' FEES IS NOT IN CONFLICT WITH THE STANDARD APPLIED BY THE THIRD CIRCUIT.

ERISA contemplates for awards of attorneys fees in 29 U.S.C. § 1132(g)(1), which provides as follows:

> (1) In any action under this title . . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

In analyzing whether Gregori should pay the attorneys' fees incurred by Schwartz in the earlier appeal, the Sixth Circuit considered the following five factors:

> (1) the degree of the opposing party's culpability or bad faith; (2) the opposing party's ability to satisfy an award of attorney's fees; (3) the deterrent effect of an award on other persons under similar circumstances; (4) whether the party requesting fees sought to confer a common benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and (5) the relative merits of the parties' positions.

*Schwartz v. Gregori*, 160 F.3d 1116, 1117 (6th Cir. 1998) *citing Secretary of Dep't of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985).

Schwartz contends that the Sixth Circuit's application of this test to the case at bar is in direct conflict with the Third Circuit's decision in *McPherson v. Employees' Pension Plan of American Re-Insurance Company, Inc.*, 33 F.3d 253 (3rd Cir. 1994), which set forth the five factors to be considered in a request for attorneys' fees under ERISA as follows:

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' positions.

*McPherson*, 33 F.3d at 254. Clearly, the five factors as expressed by the Sixth and Third Circuits are virtually identical.

The crux of what Schwartz identifies as a "direct conflict" between the Sixth and Third Circuits is *McPherson*'s recognition that bad faith and culpability are not necessarily synonymous. Specifically, the Third Circuit recognized that an award of attorneys' fees may be appropriate even when the Court does not find that the party acted with "an ulterior motive or sinister purpose," as would be required under a purely bad faith standard. *McPherson*, 33 F.3d at 256-257.

In both her Brief to the Sixth Circuit and her Petition for Writ of Certiorari, Schwartz argues that the District Court and Sixth Circuit failed to consider Gregori's culpability with respect to the underlying conduct which gave rise to the lawsuit. It is this purported failure to consider Gregori's alleged culpability which gives rise to what Schwartz characterizes as a conflict with *McPherson*.

Schwartz, however, fails to acknowledge the underlying factual distinction which separates these cases: *McPherson* dealt with attorneys' fees at the trial court level, while this case analyzes a request for attorneys' fees incurred during the appellate phase of the case. Both the District Court and the Sixth Circuit rejected the argument that Gregori's underlying conduct, which formed the factual basis for Ms. Schwartz's claims at trial, should be considered in

determining whether culpability or bad faith was present in the appellate portion of the case. Rather, the Sixth Circuit looked to the basis for the appeal:

> Ms. Schwartz argues that, in determining the degree of the opposing party's culpability or bad faith, courts must examine the bad faith or culpability of the Gregori defendants in the underlying lawsuit; whereas, the appellees maintain that, because Schwartz seeks appellate fees and costs, courts should review whether the Gregori defendants pursued their appeal in bad faith. Logic dictates the answer to this question; where an appellee seeks attorney's fee and costs for services performed in connection with defending an appeal, we review whether the appellant pursued this appeal in bad faith and not whether the appellant's conduct which resulted in litigation warrants a finding of bad faith or culpability.

*Schwartz*, 160 F.3d at 1119-1120. *McPherson* dealt with attorneys' fees before the District Court. Therefore, the *McPherson* Court never spoke to the standard which should be applied to an award of appellate attorneys' fees. Accordingly, *McPherson* is not in conflict with the Sixth Circuit's decision in this case.

It should also be noted by this Court, that the standard announced by the Sixth Circuit with respect to appellate attorneys' fees is consistent with the other Circuit's which have addressed the issue. *See DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 414 (9th Cir. 1994) (attorneys' fees not awarded for appellate work because "[a]ppellants' claims

were neither frivolous nor made in bad faith, and were supported by existing out-of-circuit law or good faith arguments to extend, modify or reverse the law of this Circuit."); and *Nachwater v. Christie*, 805 F.2d 956, 962 (11th Cir. 1986) (attorneys' fees for appellate work not awarded because defendant-appellant's "claim was neither frivolous nor pursued in bad faith.").

The fact that Gregori did not prevail with respect to his arguments does not equate to his arguments being made in bad faith. The Sixth Circuit recognized that Gregori presented novel, good faith arguments with respect to an issue of first impression:

> . . . [T]he Gregori defendants pursued an issue which had to be newly addressed by this Circuit. In addition, . . . the question of whether front pay and back pay were permissible relief for ERISA violations . . . was not answered by any other circuit. For these reasons, the District Court was entitled to conclude that the defendants' appeal to our Court and its petition for writ of certiorari were not pursued in bad faith.

*Schwartz*, 160 F.3d 1120. Even the Court in *McPherson* held that "a party is not culpable merely because it has taken a position that did not prevail in litigation." *McPherson*, 33 F.3d at 257.

Schwartz, in her Petition for Writ of Certiorari, also attacks the Sixth Circuit for only addressing Gregori's appellate arguments regarding the back pay and front pay issue. The Sixth Circuit did this, however, because it was the only issue Schwartz had addressed:

> While the Gregori defendants raised . . . other issues on appeal, neither party has argued that the issues ought to be considered individually and attorney's fees awarded only for those issues satisfying the *King* factors.

*Gregori*, F.3d at 1120, n.6.

There is no conflict between the Third and Sixth Circuits on this issue. Accordingly, pursuant to S. Ct. Rule 10, Schwartz's Petition for Writ of Certiorari should be denied.

## II.

## THE SIXTH CIRCUIT'S APPLICATION OF THE STANDARD OF REVIEW TO THE DISTRICT COURT'S RULING ON THE ATTORNEYS' FEE ISSUE IS NOT IN CONFLICT WITH THE STANDARD APPLIED BY THE THIRD AND NINTH CIRCUITS.

Schwartz next argues that the Sixth Circuit applied an incorrect legal standard when it reviewed the District Court's denial of attorneys' fees for an abuse of discretion. Schwartz mischaracterizes several decisions from the Third and Ninth Circuits as requiring a plenary standard of review.

The Sixth Circuit stated that "the decision of a district court to award attorney's fees under 29 U.S.C. § 1132(g)(1) will stand absent an abuse of discretion." *Schwartz*, 160 F.3d at 1118. This standard of review is dictated largely by the language of 29 U.S.C. § 1132(g)(1), which provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

Schwartz first points to *McPherson* for the proposition that the Sixth Circuit should have applied a plenary standard of review. *McPherson*, however, specifically provides for an abuse of discretion standard:

> An award of . . . attorney's fees to a prevailing plaintiff in an ERISA case is within the discretion of the district court and may only be reversed for abuse of discretion.

*McPherson*, 33 F.3d at 256 *quoting Schake v. Colt Indus. Operating Corp. Severance Plan*, 960 F.2d 1187, 1190 (3rd Cir. 1992).

Schwartz next cites *Ellison v. Shenango Incorporated Pension Board*, 956 F.2d 1268 (3rd Cir. 1992) for the proposition that a plenary standard of review is appropriate. *Ellison* also, however, calls for an abuse of discretion standard:

> Under section 502(g)(1) we review a district court's award or denial of attorney's fees for abuse of discretion.

*Ellison*, 956 F.2d at 1273.

Both *Ellison* and *McPherson* did, however, hold that the appellate court should undertake a plenary review of whether the district court applied the correct legal standard. *Ellison*, 956 F.2d at 1273; *McPherson*, 33 F.3d at 256. The Sixth Circuit's decision in the case at bar does not conflict with these holdings. Rather, the Sixth Circuit determined that the District Court had used the correct legal standard and analyzed the District Court's exercise of its discretion under such standard.

Schwartz also cites *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587 (9th Cir. 1984) as being in conflict with the Sixth Circuit's decision in the case at bar. The Ninth Circuit in *Smith* cited the standard of review in cases of this nature as follows:

> A decision denying fees will be set aside if the district court (1) abused its discretion, . . . (2) failed to state the reasons for its decision, . . . or (3) used incorrect legal standards to reach its decision.

*Smith*, 746 F.2d at 589. Nothing in *Smith* is inconsistent with the Sixth Circuit's holding in the instant case.

In fact, the Sixth Circuit's analysis of whether the five-factor *King* test should be applied to the underlying conduct which gave rise to the lawsuit or the arguments raised on appeal, amounts to a plenary review. The Sixth Circuit undertook an independent investigation of the conflicting arguments of Schwartz and Gregori, and concluded that the District Court had applied the correct legal standard. The Sixth Circuit then reviewed the lower court's reasoning in order to determine whether the District Court had abused its discretion in denying Schwartz's requests for additional appellate attorneys' fees.

The process utilized by the Sixth Circuit is completely in accordance with the standards of review outlined by the Third and Ninth Circuits' decisions in *Smith*, *Ellison* and *McPherson*. Since no conflict exists with respect to this issue, Schwartz's Petition for Writ of Certiorari should be denied pursuant to S. Ct. Rule 10.

## III.

## THE SIXTH CIRCUIT'S DECISION DENYING SCHWARTZ'S REQUEST FOR APPELLATE ATTORNEYS' FEES DOES NOT DEFEAT THE REMEDIAL PURPOSE OF ERISA.

In her Petition for Writ of Certiorari, Schwartz repeatedly refers to the supposed inequities associated with the lower courts' failure to award her attorneys' fees despite the fact she was the prevailing party. Schwartz contends that this will work as a deterrent against similarly situated Plaintiffs pursuing ERISA claims and defeats the remedial purpose of ERISA.

The statute, however, merely provides that a court *may, in its discretion* issue an award of attorneys' fees to the prevailing party. 29 U.S.C. § 1132(g)(1). This provision clearly contemplates that there will be situations where parties, although they ultimately prevail, are not entitled to an award of attorneys' fees. This is such a case.

Schwartz fails to recognize the inequities that would arise if a party who does not prevail at the trial level must pay the attorneys' fees of the prevailing party throughout the appellate phase of the proceedings where, as here, there are important legal issues which should be addressed by the appellate court.

The legislature could have formulated 29 U.S.C. § 1132(g)(1) to contain a "loser pays" provision, but chose not to. Congress left the decision as to the appropriateness of attorneys' fees to the individual courts to decide on a case by case basis. The Sixth Circuit thereafter adopted the five-part test set forth in *King* to assist the District Courts in examining requests for attorneys' fees.

The District Court looked at all five factors, and decided that they all weighed in favor Gregori. The Sixth Circuit reviewed the District Court's analysis and found no error. This Court has declared that it is not the purpose of the Supreme Court to substitute its judgment for that of lower courts in discretionary matters. S. Ct. Rule 10 states as much in setting forth the considerations governing this Court's review of a Petition for Writ of Certiorari:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

As demonstrated above, the District Court and Sixth Circuit properly stated the five factors to be considered in ruling on a request for attorneys's fees in a ERISA case. Accordingly, this Court's analysis need go no further and Schwartz's Petition for Writ of Certiorari should be denied.

## IV.

## THE OTHER REASONS FOR GRANTING THE WRIT CITED BY SCHWARTZ IN HER PETITION DO NOT MERIT A GRANT OF CERTIORARI.

Schwartz raises three additional arguments in the final section of her Petition for Writ of Certiorari, arguing that: (1) the District Court's factual finding with respect to Gregori's ability to satisfy a judgment was erroneous; (2) the District Court's and Sixth Circuit's determination that Schwartz did not file this lawsuit for the benefit of the plan as a whole was erroneous; and (3) caselaw relied on by the Sixth Circuit is distinguishable from the case at bar.

It is unnecessary to address these issues in any great detail, other than to point out that both the District Court and the Sixth Circuit were in accord in rejecting Schwartz's arguments relative to all three of these issues. Moreover, S. Ct. Rule 10 clearly provides that these three arguments are not grounds upon which this Court will grant Schwartz's Petition for Writ of Certiorari.

## CONCLUSION

Joseph S. Gregori, M.D. and Joseph S. Gregori, M.D., Inc., for the foregoing reasons, respectfully request that the Supreme Court deny the Petition for Writ of Certiorari filed by Diane Schwartz in connection with this matter.

Respectfully submitted,

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